TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 262

GOODALL-SANFORD, INC., PETITIONER,

vs.

UNITED TEXTILE WORKERS OF AMERICA, A.F.L. LOCAL 1802, AND UNITED TEXTILE WORKERS OF AMERICA, A.F.L.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 19, 1956

CERTIORARI GRANTED OCTOBER 8, 1956

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 18, 1956

—2984-3

DOCKET ENTRIES

Date 1955	Filings—Proceedings
Mar. 15	Complaint filed by Sidney W. Wernick, 85 Exchange St.; Portland, Maine, atty for Pl.
Mar. 15	Temporary Restraining Order, Clifford J., and for hearing on prayer of the Pl. for a preliminary injunction on the 21st day of March, 1955, at 10.30 o'clock A. M., dated and issued at 12.10 o'clock in the afternoon, March 15, 1955, filed. ($2,500 check deposited).
Mar. 15	Summons issued.
Mar. 16	Summons ret. executed. Executed Mar. 15, 1955.
Mar. 16.	Appearance of Wm. B. Mahoney, 120 Exchange St., Portland, Maine, atty. for def. filed.
Mar. 16	Motion to Dissolve Temporary Restraining Order Under Rule 65b and Motion to Dismiss Under Rule 12b 6, and Rule 12b 7, filed by atty. for def. w/Cert. of Service.
Mar. 21	Motion to Add United Textile Workers of America, A. F. L., as a Party Plaintiff w/Cert. of Service filed.
Mar. 21	Motion to Amend Complaint w/Cert. of Service filed.
Mar. 21	Hearing had in Chambers on Mar. 21, 1955.
Mar. 22	Order on Motions, Clifford J., allowing motion to add party plaintiff, denying def.'s motion to dismiss filed under Rule 12 (b) (7), denying def.'s motion to dismiss filed under Rule

12 (b) (6), allowing pl.'s motion to amend complaint, granting oral motion to withdraw prayers 1 and 2 of the original complaint, and ordering hearing on def.'s Motion to Dissolve Temporary Restraining Order under Rule 65 (b) and hearing on Pl.'s prayer for Preliminary Injunction be postponed to 10.30 A. M., Mar. 23, 1955, filed.

Mar. 22 Motion to Dissolve Temporary Restraining Order w/Cert. of Service filed by atty. for Goodall-Sanford, Inc.-

Mar. 22 Motion to Dismiss Amended Complain w/Cert. of Service filed by atty. for Goodall-Sanford, Inc.

Mar. 23 Order Denying Motion to Dissolve Temporary Restraining Order, Clifford, J., filed.

Mar. 23 Order Denying Motion to Dismiss Amended Complaint, Clifford, J., filed.

Mar. 23 Motion to Extend Restraining Order w/Cert. of Service, filed.

Mar. 23 Decree Extending Temporary Restraining Order, Clifford J., to the expiration of ten days from the 25th day of Mar. 1955 or until the further order of this Court, whichever shall first occur; and continuing the security, filed.

Apr. 1 Decree of Preliminary Injunction, Clifford, J., filed, at 9.00 A. M.

Apr. 1 Attested copies of the Decree of Preliminary Injunction filed on Apr. 1, 1955, and attested copies of the Order denying Motion to Dismiss Amended Compiaint, and Order Denying Motion to Dissolve Restraining

Order filed on Mar. 23, 1955, mailed to the following: Sidney W. Wernick and William B. Mahoney.

Apr. 5 Def.'s Answer w/Cert. of Service filed.

Apr. 6 Copy of transcript of hearing on Mar. 23 and 24, 1955, filed.

Apr. 15 Motion for Summary Judgment Pursuant to Rule 56 w/Cert. of Service filed by Sidney W. Wernick.

Apr. 15 Motion to Amend Complaint w/Cert. of Service filed by Sidney W. Wernick.

Apr. 21 Motion to Dissolve Preliminary Injunction and to Dismiss the Complaint w/Affadavit of Service filed by Wm. B. Mahoney.

May 13 Pre-trial conference held at Portland.

May 13 Motion to Amend Complaint allowed (in margin), Clifford, J.

May 13 Pre-trial memorandum filed.

May 20 Decree, Clifford J., Dissolving Preliminary Injunction, filed.

May 30 Motion to Amend Complaint, as Amended w/Cert. of Service. Motion Granted, Clifford, J., (in margin), filed.

June 1 Motion to Dissolve Preliminary Injunction and to Dismiss the Complaint filed on Apr. 21, 1955, Denied by Clifford, J., on margin thereof on June 1, 1955.

June 1 Opinion and Order, Clifford, J., on Motion for Summary Judgment with regard to the matter of specific performance of the arbitration clauses of the collective bargaining agreement, granting the Motion as aforesaid, and directing counsel for the plaintiffs to

prepare a decree in conformity with the views expressed in this Opinion, filed.

June 1. Copies of the Opinion and Order of June 1, 1955, delivered in hand to counsel by the Law Clerk.

June 13 Decree, Clifford J., directing designation by the parties of a single arbitrator or if there is a failure to agree upon such single arbitrator, the Court will so appoint and that the parties will submit to such arbitrator the questions presented, filed.

June 13 Copies of the Decree of June 13, 1955, delivered in hand to counsel.

June 27 Notice of Appeal filed by Drummond and Drummond and William B. Mahoney, attys. for Goodall-Sanford, Inc.

June 27 Bond for Costs on Appeal in the penal sum of $250, filed.

June 27 Motion to Suspend Operation of Decree for Specific Performance Pending Appeal to Court of Appeals filed by attorneys for Goodall-Sanford, Inc. Motion granted. Operation of decree entered on June 13, 1955, pursuant to order and opinion entered on June 1, 1955, suspended pending appeal, without bond, Clifford, J., filed.

July 8 Points Upon Which the Defendant Intends to Rely on the Appeal, filed.

July 11 Cert. of Service of Points Upon Which the Defendant Intends to Rely on the Appeal filed.

July 13 Stipulation filed by Sidney W. Wetnick and Wm. B. Mahoney.

UNITED STATES OF AMERICA
DISTRICT OF MAINE } ss:

I, Morris Cox, Clerk of the United States District Court in and for the District of Maine, do hereby certify that the annexed and foregoing is a true and full copy of the original docket entries In the Matter of:

UNITED TEXTILE WORKERS OF AMERICA, A. F. L. LOCAL 1802	CIVIL NO.
vs.	4–40
GOODALL-SANFORD, INC.	

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Portland, this 21st day of July, A. D. 1955.

(SEAL)

MORRIS COX,
Clerk.

STIPULATION

It is stipulated by the parties hereto as follows:

1. The complaint was amended by adding as a party plaintiff United Textile Workers of America, A. F. L.; and wherever the words "plaintiff" or "plaintiff labor organization" appear in the complaint, they are to be treated as referring to both parties plaintiff, unless the context indicates otherwise.

2. The complaint was otherwise amended from time to time and, as finally amended, read as follows:

COMPLAINT

The plaintiff complains against the defendant and says:

1. This is a civil action arising under the Labor Management Relations Act, 1947, June 23, 1947, c. 120, Title III, Section 301,—61 Stat. 156, Section 301,—29 U. S. C. A., Section 185, which is a law of the United States regulating commerce.

This Court has jurisdiction of the action by virtue of the provisions of Section 301 of Title III of the Labor Management Relations Act, 1947, 29 U. S. C. A., Section 185, the action being a suit for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce.

2. Plaintiff, United Textile Workers of America, A. F. L., Local Union 1802, is an unincorporated association and now is, and at all times relevant herein has been, a labor organization and trade union engaged in representing employees for the purposes of collective bargaining. At all times relevant herein, the plaintiff and its duly authorized officers or agents have been and now are representing or acting for employee members of the plaintiff in the State and District of Maine, and in particular have been and are now representing and acting for members of the plaintiff organization who are employees of the defendant corporation.

3. The defendant, Goodall-Sanford Inc., is a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Maine, with its principal office and place of business at Sanford, in the County of York, State and District of Maine.

4. The defendant corporation is engaged in the business of manufacturing and selling textile products which move in interstate commerce, and its conduct of

said business is such that it is in interstate commerce and affects interstate commerce within the meaning of federal laws and, in particular, the Labor Management Relations Act, 1947, 29 USCA, Section 185.

5. The plaintiff is the sole and exclusive statutory collective bargaining representative of, and agency for, all of the production and maintenance employees of the defendant corporation, including working-foreman, employed at Sanford and Springvale, Maine.

6. The plaintiff labor organization and the defendant corporation had entered into and executed a collective bargaining agreement on October 1, 1951. The said collective bargaining agreement was renewed by the parties thereto on July 29, 1953, to continue in full force and effect until July 15, 1955, unless either party were to give a notice to modify it sixty days prior to July 15, 1954. On May 12, 1954, the defendant corporation gave notice of modification to the plaintiff labor organization, as a result of which a supplemental agreement was entered into and executed by the plaintiff and defendant, effective June 21, 1954. Because of the execution of said supplemental agreement, the defendant corporation withdrew the aforesaid notice of May 12, 1954, such that the agreement dated October 1, 1951, as renewed July 29, 1953, and as supplemented by the supplemental agreement effective June 21, 1954, constitutes the entire collective bargaining agreement between the plaintiff labor organization and the defendant corporation in full force and effect until July 15, 1955.

7. In said contract the following relevant provisions appear:

A. ARTICLE VI, A-3. "CONTINUOUS SERVICE: Employee's service in an occupation will be continuous except as broken under the provisions of Section

E (Transfers) of this Article VI or by termination of his employment under the provisions of Article VII."

B. ARTICLE VII, A. "REASONS FOR TERMINATION: An employee's continuous service and his employment with the Company shall be terminated by:

1. Voluntary Quit.
2. Discharge for cause.
3. Absence from work for a period of eighteen (18) months or more for any reasons other than to fill a Union position to which the employee was elected or appointed or where an entire operation has been discontinued."

C. ARTICLE VIII, B. "ARBITRATION: If a satisfactory adjustment is not reached within ten (10) working days after initiation of conferences in Step 4, any dispute which relates solely to the meaning and application of this Agreement or any individual grievance may be referred to arbitration by written notice by either party to the other. If the written notice is not given within five (5) working days after the completion of Step 4, the grievance shall be considered as settled, and any right to arbitrate waived. Arbitration shall be in accordance with the following procedure:

1. The arbitrator shall be a single arbitrator selected from a panel of three agreed to by the Union and the Company. If the Company and the Union are unable to agree on one of the three, the arbitrator who will first be available for a hearing shall be selected.
2. The Arbitrator shall have no power to add to or to subtract from the terms of this Agreement.

3. The Arbitrator's decision shall be in writing and shall be final and binding on the Company and the Union.

4. Awards or settlements of grievances shall be effective as of the date on which the written grievance was first presented, except as otherwise provided by this Agreement, or by mutual consent.

8. On the 29th day of December, 1954, approximately 1136 production and maintenance employees, including working foremen, of the defendant corporation, employed by the defendant at Sanford and Springvale, Maine, were notified by the defendant that their employment with Goodall-Sanford, Inc. was terminated as of December 29, 1954, and that effective said date their names were being removed from the payroll records of the company. The ground of said termination was stated to be that

> "owing to the liquidation proceedings in Mills A, B, C and Print Works. . . . and the subsequent sale of the mills, the department in which (the employees) previously worked had been completely shut down and will not reopen."

9. On the 30th day of December 1954, by letter signed by Herman Ackroyd, president of United Textile Workers of America, A. F. L. Local 1802, a protest was filed with the defendant charging that the purported termination by the defendant of approximately 1136 production and maintenance employees constituted a breach of the collective bargaining agreement between the plaintiff labor organization and the defendant corporation. The said protest stated that it was to be accepted as a protest covering all workers affected, and requested that a meeting be held at the earliest convenience to discuss the matter.

10. On the 13th of January 1955, a meeting was held between the Conference Committee of the plaintiff labor organization and representatives of the defendant corporation. Subsequent to said meeting, the defendant corporation notified the approximately 1136 employees whom the company had purportedly terminated in their employment as of December 29, 1954, that the termination date of December 29, 1954. was rescinded and that a new termination date,, January 29, 1955, was fixed.

11. By letter dated January 31, 1955, duly signed by Herman Ackroyd in his capacity as president of the plaintiff labor organization, the action of the defendant in purporting to terminate the employment of approximately 1136 of its maintenance and production employees for whom the plaintiff labor organization was the exclusive, statutory collective bargaining representative and agency, was again protested as a violation by the defendant of the collective bargaining agreement in force and effect.

12. On February 18, 1955, approximately 263 additional production and maintenance employees of the defendant corporation, employed by the defendant either at Sanford or Springvale, Maine, or both, were notified that their employment with Goodall-Sanford, Inc. was terminated, effective February 18, 1955, and that as of said date their names were being removed from the payroll records of the company. The ground of this purported termination was specified to be the same as that previously given regarding the purported December 29, 1954 termination, as set forth above in paragraph 8 hereof.

13. By letter dated February 23, 1955, the plaintiff labor organization notified the defendant that it was requesting arbitration of the entire dispute in accordance

with the provisions of Section B of Article VIII of the collective bargaining agreement, as set forth in paragraph 7 aforesaid. In said letter the plaintiff labor organization submitted the names of three persons who had previously constituted a panel which had been agreed to by the plaintiff and the defendant, of whom one was to be selected—the plaintiff specifying in said letter that any one of the three persons would be acceptable to the plaintiff labor organization as an arbitrator.

14. On the 8th day of March 1955, the defendant corporation notified the plaintiff labor organization in writing that it was refusing plaintiff's request for arbitration and that it would not arbitrate the dispute regarding the termination of employment of its employees since the defendant corporation did not consider the termination of such employees arbitrable under the contract. The defendant corporation adopted this position in spite of and in the face of the provision of the collective bargaining agreement in Article VIII (B) thereof, set forth aforesaid, that at the request of either party to the contract

> "any dispute which relates solely to the meaning or application of this agreement . . . may be referred to arbitration."

The request of the plaintiff labor organization for arbitration was based on the contention that under a true construction and interpretation of Article VII of the collective bargaining agreement, as set forth aforesaid, the defendant corporation's action in terminating the employment of its employees constituted a violation of the contract.

15. Because of the refusal of the defendant corporation, though requested by the plaintiff, to submit the dispute concerning the meaning and interpretation of Article VII of the contract to arbitration, the plaintiff

brings this action in court and avers that the defendant's purported termination of the employment of approximately 1400 of its production and maintenance employees in the manner and on the grounds as above described, is a violation and breach of Article VII of the collective bargaining agreement.

16. As a result of the breach of contract committed by the defendant corporation, as above set forth, the following injuries have been caused.

A. As to life insurance benefits which were carried in the amount of $500, together with provisions for double indemnity, on the life of each employee, the company paying for the premiums on a group basis: Each employee who has been wrongfully terminated, in order to keep his life insurance in force, is obliged within thirty-one days after the date of termination to pay

> "the premium applicable to the class of risks to which he belongs, and to the form and amount of the policy at his then attained age."

The amount of premiums thus required to keep the insurance in force is far greater than what would have been required had the employee been placed on lay-off and his name retained on the payroll records of the company rather than terminated. An employee on lay-off—rather than terminated in his employment—is afforded the benefit that the defendant corporation will continue the payment of life insurance premiums, at the group rate, for the calendar month in which the lay-off began and one calendar month thereafter; and at the expiration of such period the said employee, on lay-off, could continue his policy in force by himself paying the life insurance premium at the group rate which was being paid by the company.

As to those employees terminated by the defendant wrongfully and in violation of the contract on January 29, 1955, the thirty-one day period for the employees to convert their policies has already expired and a large number of said employees, unable to afford the substantially increased premiums, were not able to effect a conversion. Their insurance status, in the event they develop claims regarding their life insurance coverage, is thus in doubt, and a situation has been created inflicting irreparable damage upon them for which any remedies at law for the breach of contract committed by the defendant are uncertain, speculative, inadequate and incomplete. It is only by restoration of the names of the said employees to the payroll records of the company, as a remedy for the breach of contract by defendant, that the insurance injuries can be properly and satisfactorily remedied. The reinstatement of the employees upon the defendant corporation's records, on lay-off status, will produce a reinstatement of the life insurance policies such that the employees, after the expiration of the calendar month in which lay-off began and one calendar month thereafter, will be able to maintain life insurance policies in force by payment of the substantially lower group premium rates.

As to those employees whose employment was wrongfully terminated by the defendant corporation on February 18, 1955, there is imminent danger that a substantial number of them will not be financially able within thirty-one days thereafter to effect a conversion of their life insurance at the much higher premium rate which they will be obliged to pay because of the wrongful termination of their employment. There is thus the imminent danger that they are exposed to the immediate risk, by the wrongful conduct of the defendant corporation, that their

life insurance status will be rendered clouded and uncertain subjecting them to irreparable damage for which any remedies at law are uncertain, speculative, inadequate and incomplete. It is thus necessary, as to these employees that, to remedy the breach of contract committed by the defendant, they be reinstated upon the payroll records of the company on lay-off status—in order that they shall have the opportunity to continue their insurance in force, by payment of premiums on a group basis, and not be subjected to the risk that their life insurance will lapse because of their inability to pay the much larger premium rates applicable to the classes of risks to which they belong and to the form and amount of the policies at their then attained age.

As to those employees wrongfully terminated in their employment by the defendant corporation in breach of the collective bargaining agreement, as set forth aforesaid, who have already converted their life insurance by paying the substantially higher premium rates thus wrongfully required of them, money damages are claimed for the losses thus sustained.

B. As to health and accident insurance, the premiums for which are required to be paid by the defendant corporation on a group basis rate, and by virtue of which the employees are entitled to a weekly benefit of $22.50 per week, lasting for a maximum of thirteen weeks for any one disability, (beginning on the eighth day in the case of illness, and on the first day in the case of accident,) and are also entitled to medical and surgical benefits and maternity benefits: The defendant's breach of contract in purporting to terminate its employees, as aforesaid, had deprived all of the said employees thus wrongfully terminated, of an automatic extension of the benefits for thirty-one days thereafter, which would be the insurance coverage in the event the employees were not

terminated but were laid off and kept on the payroll records of the company, as required by the contract.

As a result thereof, the health and accident insurance coverage of many employees wrongfully terminated by the defendant on January 29, 1955, whose health and accident claims originated within thirty-one days after January 29, 1955, has been rendered doubtful. Thereby, said employees have been subjected to damage that is irreparable at law and for which the remedies at law are uncertain, speculative, inadequate and incomplete, since said employees will be unable to refute that their employment might not otherwise have been terminated, prior to the origin of their claims, on some ground permitted by the collective bargaining agreement between plaintiff and defendant. It is therefore requisite, to afford said employees adequate remedies, that their names be reinstated on the payroll records of the company as of January 29, 1955, on lay-off status,—thereby to maintain their health and accident insurance coverage effective for thirty-one days subsequent to the 29th day of January, 1955.

As to those employees wrongfully terminated in their employment by the defendant on February 18, 1955, all of them are exposed to the immediate and imminent risk of irreparable damage for which the remedies at law are uncertain, speculative, inadequate and incomplete, in the event that before the expiration of thirty-one days from the 18th of February 1955, they become entitled to make claims for benefits under their health and accident coverage, concerning the effectiveness of which the defendant has created a cloud by its wrongful act of terminating the employment of said employees. To provide satisfactory remedy against the wrong thus perpetrated by the defendant, it is requisite that the names

of said employees be ordered reinstated on the payroll records of the defendant, on lay-off status, as of February 18, 1955,—thereby to maintain their health and accident insurance benefits in effect for thirty-one days from the said 18th of February 1955.

C. As to Blue Cross hospitalization benefits for which the defendant corporation in the event of lay-off, was required to continue to pay premiums at a group rate for the benefit of the employee himself until the fifteenth day of the calendar month next following the date of layoff, and as to which, in the event lay-off continue thereafter, the employee himself had the privilege of paying the premium, at the group rate, to keep his policy alive, but as to which in the event of termination of employment, the employee is obliged immediately to pay for himself at a higher premium rate without the benefit of group savings: The wrongful act of the defendant corporation in terminating the employment of its employees, as set forth aforesaid, has produced injuries as follows:

(1) As to those employees wrongfully terminated on January 29, 1955, a substantial number have been unable to afford the additional premiums, in excess of the group rate, necessary to continue their hospitalization insurance in force. A cloud has thus been cast upon their Blue Cross hospitalization insurance rights such that for any hospitalization claims of said employees originating after the 15th day of February 1955, the remedies at law are uncertain, speculative, inadequate and incomplete. To furnish said employees a satisfactory remedy against the defendant's wrongful termination of their employment, it is necessary that they be reinstated on the payroll records of the company, on lay-off status, that they may have the benefit of continuing their policies in force

(after February 15, 1955) by paying the lower group premium rates.

(2) As to those employees wrongfully terminated on February 18, 1955, a substantial number of them are exposed to the immediate and imminent danger that they will lose their group Blue Cross hospitalization insurance because of inability to pay the higher premium rates which the termination of their employment requires. As to such employees, there is thus the imminent danger of irreparable damage, in the event they shall have claims for hospitalization benefits for which the remedies at law are uncertain, speculative, inadequate and incomplete. To protect their rights, it is necessary that they be reinstated on the payroll records of the defendant corporation, on lay-off status, so that they shall have the opportunity of continuing their Blue Cross hospitalization in force (after March 15, 1955) by paying premiums therefor at the lower group rate.

(3) As to those employees wrongfully terminated by the defendant corporation either on January 29 or February 18, 1955, whose claim for insurance benefits originated before the expiration of fifteen days in the calendar month next following the date of the wrongful termination, or who renegotiated their Blue Cross hospitalization insurance—in spite of termination—by paying premiums therefor at rates higher than the group premium rate which would have been available to them had they been retained on the payroll records of the defendant, damages are claimed and sought.

D. Pursuant to Article X-C of the collective bargaining agreement in force and effect between the plaintiff and defendant, the employees of the defendant are entitled to pension, or retirement, benefits as follows:

ARTICLE X-C. PENSIONS: In accordance with an agreement between the parties dated May 25, 1951, the Company on approval by the Wage Stabilization Board will modify its present retirement benefits to the following. The Company will pay retirement benefits to employees who, having attained the age of 65, retire from employment with the Company and have at the time of their retirement completed 20 years or more of continuous service with the Company.

(1) Retirement benefits will be in the amount of $20 a month for such employees who have completed 20 years of continuous service but not more than 24 years of continuous service.

(2) Retirement benefits will be in the amount of $25 a month for those that have completed 25 or more years of continuous service.

The wrongful termination by the defendant of the employment of approximately 1436 of its production and maintenance employees on January 29 and February 18, 1955, has deprived those employees, otherwise eligible for pension, who have already attained the age of sixty-five but have not yet chosen to retire, or who will attain the age of sixty-five between January 29, 1955—or February 18, 1955,—and July 15, 1955, (the expiration date of the collective bargaining agreement) of the right to retire from employment with the company and collect retirement benefits. This inflicts irreparable damage upon said employees of the defendant for which the remedies at law are uncertain, speculative, inadequate and incomplete. To afford said employees proper remedy regarding their pension benefits, it is requisite that the names of those employees whose pension rights have

been affected by the wrongful termination of employment, perpetrated by the defendant, be reinstated on the payroll records of the defendant, on lay-off status, either as of January 29, 1955, or as of February 18, 1955, depending on which of said dates was the date of termination in the individual case.

E. Pursuant to Article V, B & C of the collective bargaining agreement between plaintiff and defendant, the production and maintenance employees of the defendant employed at Sanford or Springvale, Maine, are entitled to vacation pay for the current vacation year as follows:

> ARTICLE V, B. "ELIGIBILITY REQUIREMENTS: During the term of this agreement an employee on the payroll of the Company on June 1st of the vacation year and who has worked at least 900 hours in the twelve-month period from June 1 of the preceding year to May 31 of the vacation year (both dates included) shall be eligible for vacation with pay if he qualifies under the following requirements:
>
> (1) An employee with one (1) year, but less than three (3) years of continuous service with the Company shall receive one (1) week of vacation with forty (40) hours' pay.
>
> (2) An employee with three (3) years, but less than five (5) years of continuous service with the Company shall receive one (1) week of vacation with sixty (60) hours' pay.
>
> (3) An employee with five (5) years or more of continuous service with the Company shall receive two (2) weeks of vacation with eighty (80) hours' pay.

Employees who have returned with continuous seniority from the armed services of the U. S. during the twelve-month period from June 1 of the preceding year to May 31 of the vacation year, are not required to have worked 900 hours during that period in order to qualify for vacations with pay.

ARTICLE V, C. VACATION PAY: Vacation pay will be computed by multiplying the number of hours to which the employee is entitled by the employee's average hourly earnings. Average hourly earnings for day workers will be equal to the regular rate which the employee received during the payroll week which includes the first of June immediately preceding the vacation period. If the employee did not work during that week the rate which the employee received during the week next preceding June 1 in which the employee worked will be used. The average hourly earnings exclusive of overtime for a four (4) week period in month of May immediately preceding the vacation period. If the employee did not work during the month of May his average straight-time hourly earning during the next month preceding May in which the employee worked will be used.

The wrongful termination by the defendant of the employment of approximately 1436 of its employees on January 29 and February 18, 1955, as set forth aforesaid, prevents said employees from being on the payroll records of the company on June 1st of the current vacation year and has thereby wrongfully purported to render such employees immediately ineligible for vacation pay for the current vacation year. Defendant's wrongful act and breach of contract in terminating the employment of said employees, has thus subjected the rights of said

employees to vacation pay to a cloud. It threatens damage to said employees for which the remedies at law are uncertain, speculative, inadequate and incomplete in that said employees of the defendant, so long as their names remain deleted from the payroll records of the defendant between January 29, or February 18, 1955 (as the case may be) and June 1, 1955 will be unable, in any action for damages which might be instituted after June 1, 1955, to disprove that their employment might not have been terminated and their names removed from the payroll records, prior to June 1, 1955, for some reason, or ground, permitted by the collective bargaining contract. Hence, to afford said employees effective remedy against the defendant's breach of contract, and to prevent the imminent threat of irreparable damage to said employees, it is requisite that the names of all employees wrongfully terminated on January 29 or February 18, 1955, be reinstated on the payroll records of the defendant, on lay-off status, as of the date of purported termination,—so that said employees may continue eligible for vacation pay, unless and until their names are subsequently removed from defendant's payroll records before June 1, 1955, for a reason, if any, permitted by the collective bargaining agreement between plaintiff and defendant.

17. Plaintiff has been informed by defendant that in the immediate future defendant intends to terminate the employment of an additional 1800 of its production and maintenance employees employed by the defandant at Sanford or Springvale, Maine. Defendant has informed plaintiff that said termination will be purportedly effected for the same reason and on the same ground as the purported termination of the other approximately 1436 employees on January 29 and February 18, 1955—all as alleged aforesaid. Such termination may occur at any

moment. There is thus an imminent and immediate threat and danger of a further violation by the defendant of the collective bargaining agreement in effect between the plaintiff and the defendant, involving an additional approximately 1800 employees of the defendant, who will be subjected to irreparable damage concerning life insurance, health and accident insurance, hospitalization insurance, pension and vacation pay benefits for which, for the same reasons as set forth above regarding the employees wrongfully terminated on January 29 and February 18, 1955, remedies at law will be uncertain, speculative, inadequate and incomplete.

WHEREFORE PLAINTIFF PRAYS:

That this Honorable Court order and decree specific performance of the contractual clauses pertaining to arbitration, and order the Defendant to submit the matter in dispute, the Union having so requested, to arbitration, and to select, within such time as the Court shall order, one of the three persons, who had previously constituted a panel which had been agreed to by the Union and the Defendant, as arbitrator; and, in the meantime, and pending the submission of the matter to arbitration, this Court award such relief by way of restraining order or injunction, as to this Court may seem meet and proper under all the circumstances.

DATED at Portland, State and District of Maine this 14th day of March, 1955.

UNITED TEXTILE WORKERS OF AMERICA, A. F. L.
LOCAL NO. 1802

By HERMAN ACKROYD,
President.

[fol. 26a] "EXHIBIT A" TO STIPULATION

Agreement between Goodall-Sanford, Inc., Sanford, Maine, and United Textile Workers of America, American Federation of Labor, Local 1802.

October 1, 1951

Renewed July 29, 1953

* * * * * * *

[fol. 26b] Purpose of Agreement

It is the intent and purpose of the parties hereto to promote and improve the industrial and economic relations between the Company, its employees, and the Union, and to establish and maintain a basic understanding in relation to rates of pay, hours of work, and other conditions of employment toward full cooperation, good quality of production, and successful operation of the Company's plants.

Article I—Recognition

A. Bargaining Unit: The Company recognizes the Union as the exclusive collective bargaining agency for all its production and maintenance employees including working-foremen employed at Sanford and Springvale, Maine, in respect to rates of pay, wages, hours, and other conditions of employment. Executives, overseers, second hands, foremen, section hands, guards, and all office workers, laboratory workers, and research workers are not considered production and maintenance employees under this agreement.

* * * * * * *

[fol. 26c] D. Rights of Management: The management of the Company's business, including the determination of the type of products to be manufactured, new methods and processes of production, including equitable and reasonable work loads, the direction of its working force and the right to hire, lay-off and suspend employees is vested exclusively in the Company, subject to the provisions of this agreement.

* * * * * * *

[fol. 26d] Article III—Hours of Employment

A. Hours of Work: The normal hours of work for each shift shall be forty (40) hours per week divided into five (5) days of eight (8) hours each, Monday to Friday inclusive, but this provision shall not apply to power plant and filter plant employees. The hours of work per day or per week may be decreased at the discretion of the Company, subject to the provisions of this agreement.

[fol. 26e] Article V—Vacations

A. Vacation Period: The company will close normal production operations during some week in the month of July to give all employees covered by the terms of this agreement one week's vacation from work. The Company will announce the vacation week on or before May 1 of the year involved. Employees necessary for maintenance and repair work shall be given their week's vacation during a different week than the production employees. Employees entitled [fol. 26f] to receive eighty (80) hours' vacation pay under this Article shall at their request and by prior arrangement with their overseers have one (1) additional week's vacation at some time after the vacation shutdown.

B. Eligibility Requirements: During the term of this agreement an employee on the payroll of the Company on June 1st of the vacation year and who has worked at least 900 hours in the twelve-month period from June 1 of the preceding year to May 31 of the vacation year (both dates included) shall be eligible for vacation with pay if he qualifies under the following requirements:

1. An employee with one (1) year, but less than three (3) years of continuous service with the Company shall receive one (1) week of vacation with forty (40) hours' pay.

2. An employee with three (3) years, but less than five (5) years of continuous service with the Company shall receive one (1) week of vacation with sixty (60) hours' pay.

3. An employee with five (5) years or more of continuous service with the Company shall receive two (2) weeks of vacation with eighty (80) hours' pay.

Employees who have returned with continuous seniority from the armed services of the U. S. during the twelve-month period from June 1 of the preceding year to May 31 [fol. 26g] of the vacation year, are not required to have worked 900 hours during that period in order to qualify for vacations with pay.

C. Vacation Pay: Vacation pay will be computed by multiplying the number of hours to which the employee is entitled by the employee's average hourly earnings. Average hourly earnings for day workers will be equal to the regular rate which the employee received during the payroll week which includes the first of June immediately preceding the vacation period. If the employee did not work during that week the rate which the employee received during the week next preceding June 1 in which the employee worked will be used. The average hourly earnings for a piece or incentive worker shall be the average straight-time hourly earnings exclusive of overtime for a four (4) week period in the month of May immediately preceding the vacation period. If the employee did not work during the month of May his average straight-time hourly earnings during the next month preceding May in which the employee worked will be used.

D. Vacation Bonus: During the term of this agreement each employee on the payroll on June 1st of the vacation year who does not qualify for vacation pay under the foregoing provisions shall be entitled to a vacation bonus under the following conditions:

[fol. 26h] 1. If he has been in the continuous employment of the Company for three (3) months prior to June 1 of the year in which the vacation shutdown occurs, he shall receive a vacation bonus amounting to two (2) per cent of his total earnings exclusive of overtime for the twelve months ending on May 31 preceding such June 1.

2. If he has been in the continuous employment of the Company for three (3) years but less than five (5) years prior to June 1 of the year in which the vacation shutdown occurs, he shall receive a vacation bonus amounting to three (3) per cent of his total earnings exclusive of overtime for the twelve months ending on May 31 preceding such June 1.

3. If he has been in the continuous employment of the Company for five (5) years or more prior to June 1 of the year in which the vacation shutdown occurs, he shall receive a vacation bonus amounting to four (4) per cent of his total earnings exclusive of overtime for the twelve months ending on May 31 preceding such June 1.

Article VI—Seniority

* * * * * * *

[fol. 26i] 3. Continuous Service: An employee's service in an occupation will be continuous except as broken under the provisions of Section E (Transfers) of this Article VI or by termination of his employment under the provisions of Article VII.

* * * * * * *

[fol. 26j] Article VII

Termination of Employment

A. Reasons for Termination: An employee's continuous service and his employment with the Company shall be terminated by:

1. Voluntary Quit.
2. Discharge for cause.
3. Absence from work for a period of eighteen (18) months or more for any reasons other than to fill a [fol. 26k] Union position to which the employee was elected or appointed or where an entire operation has been discontinued.

* * * * * * *

[fol. 26l] Article VIII

Adjustment of Grievances

A. Grievance Procedure: The following procedure shall be employed in adjusting grievances and disputes:

Step 1. The matter may be taken up between the aggrieved employee, the Union Steward for the occupation and the Overseer of the department.

Step 2. If not satisfactorily adjusted, the matter may

be reduced to writing on forms provided by the Company, and taken up between the Union Conference Committeeman, Union Steward, the employee, and the Agent or Superintendent of the Mill involved.

Step 3. If not satisfactorily adjusted within five (5) working days after presentation of the written grievance to the Agent or Superintendent the matter may be taken up between Union Representatives (President, Vice President, Conference Committeeman, Steward), the employee, and representatives of the Industrial Re- [fol. 26m] lations Department and of the Mill involved. Meetings will be held Tuesdays, and if necessary, Wednesdays unless otherwise agreed.

Step 4. If not satisfactorily adjusted within ten (10) working days the matter may be taken up between representatives of the Local Union and the International Union, the Union Conference Committee, the Director of Industrial Relations and representatives of the Company.

B. Arbitration: If a satisfactory adjustment is not reached within ten (10) working days after initiation of conferences in Step 4, any dispute which relates solely to the meaning and application of this Agreement or any individual grievance may be referred to arbitration by written notice by either party to the other. If the written notice is not given within five (5) working days after the completion of Step 4, the grievance shall be considered as settled, and any right to arbitrate waived. Arbitration shall be in accordance with the following procedure:

1. The arbitrator shall be a single arbitrator selected from a panel of three agreed to by the Union and the Company. If the Company and the Union are unable to agree on one of the three, the arbitrator who will first be available for a hearing shall be selected.

[fol. 26n-26o] 2. The Arbitrator shall have no power to add to or to subtract from the terms of this Agreement.

3. The Arbitrator's decision shall be in writing and shall be final and binding on the Company and the Union.

4. Awards or settlements of grievances shall be effective as of the date on which the written grievance was first presented, except as otherwise provided by this Agreement, or by mutual consent.

[fol. 26p] Article X

Insurance Benefits

[fol. 26q] C. Pensions: In accordance with an agreement between the parties dated May 25, 1951, the Company on approval by the Wage Stabilization Board will modify its present retirement benefits to the following. The Company will pay retirement benefits to employees who, having attained the age of 65, retire from employment with the Company and have at the time of their retirement completed 20 years or more of continuous service with the Company.

(1) Retirement benefits will be in the amount of $20 a month for such employees who have completed 20 years of continuous service but not more than 24 years of continuous service.

(2) Retirement benefits will be in the amount of $25 a month for those that have completed 25 or more years of continuous service.

[fol. 26r] Article XIII

Agreements and Amendments

It is understood that, except for those written agreements which are initialled by the parties as of the date of this agreement, all prior agreements were terminated on October 1, 1951, and that this Contract contains all matters on which the parties are mutually agreed. If at any time while this agreement is in effect the parties desire to modify, amend, or add to it in any respect either retroactively or prospectively they may do so by mutual assent. Agreements to modify, amend, or supplement this Contract shall be reduced to writing and signed by representatives of the Union and the Company.

[fol. 26s] Article XVI

Waiver

The parties acknowledge that during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Company and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to, or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this agreement.

DEFENDANT'S ANSWER

1. The defendant denies that this is a civil action arising under the Labor Management Relation Act of 1947 and denies that this Court has jurisdiction of the action by virtue of Section 301 of Title III of the Labor Management Relations Act, 1947, 29 U. S. C. A., Section 185, and denies that this action is a suit within the meaning of said Section 185 of said Labor Management Relations Act of 1947.

2. The defendant admits the allegations in Paragraph Numbered 2 of said Complaint.

3. The defendant admits the allegations in Paragraph Numbered 3 of said Complaint.

4. Except as hereinafter specifically admitted, the defendant denies each and every material allegation in Paragraphs Numbered 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16A, B, C (1), (2), (3), D, E and 17.

5. And further answering, the defendant says:

For a considerable period prior to July, 1954, the management of the defendant corporation recognized that manufacturing costs at Sanford and Springvale were non-competitive and, unless such costs could be reduced, operations would have to be discontinued. Despite efforts to reduce said costs, the consolidated net loss of the defendant corporation for the fiscal year ending June 30, 1954, before tax recovery, amounted to $4,614,000.00.

Decision was therefore made to discontinue the manufacturing of carpeting and automotive, furniture, transportation and decorative fabrics in the Sanford division, and it was found necessary, soon thereafter, to discontinue production in the women's wear woolen mill.

Operations in the Goodall division for the manufacture of Palm Beach cloth and similar fabrics was continued. However, for the three months' period July 1 to October 2, 1954, the defendant corporation sustained a consolidated net loss of $771,069.00, and, for the period October 3, 1954 to January 1, 1955, the defendant corporation sustained a further consolidated net loss of $2,329,769.00.

The basic difficulty was extremely high unit cost, a very substantial portion of which was attributable to labor costs.

As a result of these continued losses there was no alternative but to discontinue all operations at Sanford and Springvale.

The decision to discontinue all operations, which was, of course, a prerogative of management, which should not and could not be delegated either to the union or to an arbitrator, carried with it also the right to terminate the employment of employees, and nothing in the collective bargaining agreement covered, or purported to cover, such a cessation of business and termination of employment.

Thereupon, in accordance with the decision of Management to terminate all operations at its mills in Sanford and Springvale, the defendant corporation inaugurated a program of the orderly liquidation of various departments of its operations at Sanford and Springvale and, on the 29th day of December, 1954, notified approximately 1136 of its production and maintenance employees, who had theretofore been employed in Mills A, B, C and the Printworks, that, effective December 29, 1954, their names were being removed from the payroll records of the Company and their respective employments with the Company were terminated as of December 29, 1954;

that on the 30th day of December, 1954, by letter signed by Herman Ackroyd, President of United Textile Workers of America, A. F. L. Local 1802, the termination by the defendant corporation of said 1136 production and maintenance employees was protested and a meeting of the union representatives with the Defendant corporation was requested.

Thereafterwards, on January 13, 1955, a meeting between the representatives of the plaintiffs and of the defendant was held and, as a result thereof, each of said 1136 employees was notified that the defendant corporation was deferring the effective date of the termination to January 29, 1955, and said employees were advised that persons who had otherwise qualified for holiday pay January 1, 1955, would be paid such holiday pay, and that arrangement had been made for the continuation of group insurance policies to January 29, 1955, and for the conversion of group life insurance into individual life insurance policies during the period of 31 days after January 29, 1955.

By letter dated January 31, 1955, signed by said Herman Ackroyd, a further meeting of the union representatives and the defendant corporation was requested to decide upon procedure to be followed in an attempt to resolve the dispute.

On February 18, 1955, the defendant notified approximately 263 production and maintenance employees of the defendant corporation employed at Sanford, that owing to the liquidation proceedings in Mills "A," "B," "C" and "Printworks," and the subsequent sale of the mills, the department in which each employee previously worked had been completely shut down and would not reopen, and, since there was no further possibility of continuance of operations in any of the departments

affected, said 263 employees were notified that the employment of each with Goodall-Sanford was terminated and each employee was advised that their names would be removed from the payroll records of the company, effective as of February 18, 1955; that by letter of February 23, 1955, signed by said Herman Ackroyd, the plaintiffs advised the defendant corporation that, concerning the termination notices sent to Mill "B" and Mill "A" employees, the union was requesting arbitration of the dispute; that thereafterwards, on March 2, 1955, a meeting was held between representatives of the plaintiff labor organizations and the defendant corporation with respect to termination notices sent to Mills "B," "C," "A" and "Printworks," at which meeting the union was advised by the defendant corporation that the company had the absolute right to completely shut down all or any part of its business and, where there was no possibility of future reopening, to terminate its employees and that this action was not covered and was not attemped to be covered in the collective bargaining agreement between the company and the union dated October 1, 1951, and renewed July 29, 1953; and that the company did not consider that the termination of such employees was arbitrable under the contract, and the request for arbitration was refused, and, as requested by the union, the position of the company was confirmed in writing by a letter from the company to the union dated March 8, 1955.

The defendant corporation has now completely ceased all production operations in the Sanford and Springvale mills and all of the real estate and buildings have been sold and a considerable portion of the mills have been re-sold by the purchaser to other industries, which are now operating in portions of the buildings.

Most of the machinery and equipment have also been sold and removed from the mill buildings.

The defendant corporation will not resume any operations in the future at either Sanford or Springvale.

Dated April 5, 1955.

GOODALL-SANFORD, INC.

By WILLIAM B. MAHONEY,
Its Attorney.

MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56

And now come the plaintiffs in the above entitled cause, after the expiration of twenty days from the commencement of the said action, and after the filing of an answer by the defendant, and move this Court to render summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon that part of the plaintiffs' complaint, as amended, which pertains to decreeing specific performance of the contractual clauses pertaining to arbitration—all as set forth in plaintiffs' complaint with particular reference to paragraph 5 among the prayers for relief, as contained in the amended complaint.

Summary judgment is sought and requested to be rendered in favor of plaintiffs, with regard to the matter of the specific enforcement of the contractual clauses pertaining to arbitration, on the ground that the pleadings and all other matters now on file and part of the record in this case show that there is no genuine issue as to any material fact regarding the issue of specific performance of the arbitration clauses of the agreement and

that the plaintiffs are entitled to a judgment decreeing specific performance of the arbitration clauses of the contract, as a matter of law.

Dated at Portland, State and District of Maine, this fifteenth day of April, A. D. 1955.

SIDNEY W. WERNICK,
Attorney for the Plaintiff.

MOTION TO DISMISS THE COMPAINT

The Defendant moves that the complaint be dismissed because the Supreme Court of the United States on March 28, 1955, has decided that District Courts of the United States do not have jurisdiction under Section 301—L. R. M. A. of 1947 to grant the relief demanded in the Complaint.

Salaried Employee's Assn. vs. Westinghouse Electric Co. U. S. Sup. Ct. decided March 28, 1955.

See also Local 205 Electrical Workers vs. General Electric Co., 27 Labor cases, 69,085 P. 88,567, GS.

Dated April 20, 1955.

GOODALL-SANFORD, INC.,
Defendant.

By WILLIAM B. MAHONEY,
Its Attorney.

OPINION AND ORDER

CLIFFORD, J.

This matter comes before this Court upon the motion of the plaintiffs for summary judgment upon that part of their complaint, as amended, in which they request specific performance of the arbitration clauses of a collective bargaining agreement. The plaintiffs instituted their action under Section 301 of the Labor Management Relations Act of 1947, 29 USCA, Section 185.

With regard to the aforementioned request for specific performance, this Court is of the opinion that there is no genuine issue of material fact. Briefly, the facts are as follows:

The plaintiff, United Textile Workers of America, A. F. L. Local, 1802, and the plaintiff, United Textile Workers of America, A. F. L., are both unincorporated associations and at all times relevant herein, have been labor organizations and trade unions engaged in representing employees for the purposes of collective bargaining. The plaintiffs have been representing, or acting for, employee-members of the plaintiff labor organizations in the State and District of Maine; and, in particular, have been representing and acting for members of the plaintiff organizations who are employees of the defendant corporation, Goodall-Sanford, Inc. They are the sole and exclusive statutory collective bargaining representative of, and agency for, all the production and maintenance employees of the defendant corporation, including working foremen, employed at Sanford and Springvale, Maine.

The defendant corporation, Goodall-Sanford, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Maine with its principal office and place of business at Sanford, Maine. As of

April 5, 1955, it has completely terminated all production operations in its Sanford and Springvale mills and all of the real estate and buildings have been sold. Prior to such termination, however, the defendant corporation was engaged in the business of manufacturing and selling textile products which moved in interstate commerce. Its conduct of said business was such that it affected interstate commerce within the meaning of Federal Laws and, in particular, the Labor Management Relations Act of 1947, 29 USCA Section 185.

On October 1, 1951, the plaintiff labor organizations and the defendant corporation entered into and executed a collective bargaining agreement which was renewed by the parties thereto on July 29, 1953. As thus renewed, said agreement provided, as to its duration, that the said agreement is to

> "continue in full force and effect until July 15, 1955, unless either party gives a notice to modify, 60 days prior to July 15, 1954."

On May 12, 1954, the defendant corporation gave notice of modification to the plaintiff labor organizations as a result of which a supplemental agreement was entered into and executed by the plaintiff and defendant on June 21, 1954. Because of the execution of said supplemental agreement, the defendant corporation withdrew the aforesaid notice of May 12, 1954, with the result that the agreement dated October 1, 1951, as renewed July 29, 1953, and as supplemented by the supplemental agreement executed June 21, 1954, constitutes the entire collective bargaining agreement between the plaintiff labor organizations and defendant corporation. The said collective bargaining agreement provides that it shall continue in full force and effect until July 15, 1955.

Among the provisions of said collective bargaining agreement between the plaintiffs and the defendant are found the following:

ARTICLE I-A BARGAINING UNIT:

"The Company recognizes the Union as the exclusive collective bargaining agency for all its production and maintenance employees including working-foremen employed at Sanford and Springvale, Maine, in respect to rates of pay, wages, hours, and other conditions of employment. Executives, overseers, second hands, foremen, section hands, guards, and all office workers, laboratory workers; and research workers are not considered production and maintenance employees under this agreement."

ARTICLE VI.-A-3. CONTINUOUS SERVICE:

"Employee's service in an occupation will be continuous except as broken under the provisions of Section E (Transfers) of this Article VI or by termination of his employment under the provisions of Article VII."

ARTICLE VII-A. REASONS FOR TERMINATION:

"An employee's continuous service and his employment with the Company shall be terminated by:

1. Voluntary quit.

2. Discharge for cause.

3. Absence from work for a period of eighteen (18) months or more for any reason other than to fill a Union position to which the employee was elected or appointed or where an entire operation has been discontinued."

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ARTICLE VIII-B. ARBITRATION:

"If a satisfactory adjustment is not reached within ten (10) working days after initiation of conferences in Step 4, any dispute which relates solely to the meaning and application of this Agreement or any individual grievance may be referred to arbitration by written notice by either party to the other. If the written notice is not given within five (5) working days after the completion of Step 4, the grievance shall be considered as settled, and any right to arbitrate waived. Arbitration shall be in accordance with the following procedure:

1. The arbitrator shall be a single arbitrator selected from a panel of three agreed to by the Union and the Company. If the Company and the Union are unable to agree on one of the three, the arbitrator who will first be available for a hearing shall be selected.
2. The Arbitrator shall have no power to add to or substract from the terms of this Agreement.
3. The Arbitrator's decision shall be in writing and shall be final and binding on the Company and the Union.
4. Awards or settlements of grievances shall be effective as of the date on which the written grievance was first presented, except as otherwise provided by this Agreement, or by mutual consent."

PURPOSE OF AGREEMENT.

"It is the intent and purpose of the parties hereto to promote and improve the industrial and economic relations between the Company, its employees, and the Union, and to establish and maintain a basic

understanding in relation to rates of pay, hours of work, and other conditions of employment toward full cooperation, good quality of production, and successful operation of the Company's plants."

ARTICLE XVI—WAIVER.

"The parties acknowledge that during the negotiations which resulted in this agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Company and the Union for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this agreement."

Because of continued heavy losses, the defendant corporation decided to terminate all operations at its mills in Sanford and Springvale, Maine, and inaugurated a program of liquidation. On December 29th, 1954, the defendant notified approximately 1136 of its production and maintenance employees, who had theretofore been employed in Mills "A," "B," "C," and the "Printworks" of the defendant corporation, that effective December 29, 1954, their names were being removed

from the payroll records of the company and that their respective employment with the company was terminated as of December 29, 1954. On February 18, 1955, the defendant corporation further notified approximately 263 production and maintenance employees of the defendant corporation employed at Sanford, that the employment of each with the defendant was terminated and each employee was advised that his name was being removed from the payroll records of the company, effective February 18, 1955.

The ground on which the aforesaid notices of termination was based was that owing to the liquidation proceedings in Mills "A," "B," "C," and "Printworks," and the subsequent sale of the mills, the department in which each employee had previously worked had been completely shut down and would not reopen.

On December 30, 1954, by letter signed by Herman Ackroyd, President of United Textile Workers of America, A. F. L., Local 1802, the purported termination by the defendant of the aforesaid approximately 1136 production and maintenance employees was protested and a meeting of the union representatives with the defendant corporation was requested. Such a meeting was held on January 13, 1955, and, as a result thereof, each of the aforesaid approximately 1136 employees was notified that the defendant corporation was deferring the effective date of termination, as to such employees, until January 29, 1955. Said employees were further advised that persons who had otherwise qualified for holiday pay on January 1, 1955, would be paid for such holiday pay, and that arrangements had been made for the continuance of group insurance to January 29, 1955, and for the conversion of group life insurance to individual life insurance policies to continue 31 days after January 29, 1955.

On January 31, 1955, by letter bearing said date and signed by the aforesaid Herman Ackroyd in his aforesaid capacity, a further meeting of the defendant corporation and union representatives was requested to decide upon the procedure to be followed in an attempt to resolve the dispute regarding the termination of employees of the defendant.

After the termination notices had been sent, on February 18, 1955, to an additional 263 production and maintenance employees, as set forth aforesaid, by letter of February 23, 1955, signed by the aforesaid Herman Ackroyd in his aforesaid capacity, the plaintiffs notified the defendant that they were requesting arbitration of the dispute, in accordance with the provisions of Section B of Article VIII of the collective bargaining agreement, particular reference being made to the termination notices sent to Mill "B" and Mill "A" employees. In said letter, plaintiffs further submitted the names of three persons, any one of whom the plaintiffs specified would be acceptable to the plaintiffs as an arbitrator. During the last five years when some forty or fifty matters had been submitted by the parties to arbitration, one or the other of the three designated persons had served as an arbitrator, with but two exceptions.

Thereafterwards, on March 2, 1955, a meeting was held between representatives of the plaintiff labor organizations and the defendant corporation with respect not only to the termination notices sent to Mill "B" and "A" employees but also to employees of Mill "C" and of the "Printworks." At this meeting, the plaintiffs were advised by the defendant that the defendant corporation regarded the question of the termination of its employees as a non-arbitrable question under the collective bargaining contract. Accordingly, the defendant corporation refused to submit the dispute concerning

the termination of its employees to arbitration. This refusal by the defendant was confirmed in writing, at the request of the plaintiffs, by a letter dated March 8, 1955.

The defendant corporation assigned as the reason for its refusal to submit the termination dispute to arbitration the contention that the collective bargaining agreement between the defendant and the plaintiffs does not cover, and does not attempt to cover, the situation where the defendant terminates its employees because it has completely shut down all or part of its business without possibility of reopening, as a result of continued heavy losses.

The dispute between the parties in this case concerns the right of the defendant corporation to terminate its production and maintenance employees for a reason, which admittedly is not included among those specified in Article VII—A.

The plaintiffs contend that the terms of Article VI-A-3 and VII-A, as well as other clauses of the collective bargaining agreement, manifest an intention by the parties that the grounds for termination set forth in Article VII-A were intended to be exclusive and limited to those alone. The defendant on the other hand contends that the decision to discontinue all operations of its business and thereby terminate the employment of its employees is a prerogative of management which was not covered nor intended to be covered in the collective bargaining agreement. In other words that the grounds for termination, explicitly written in the agreement are supplemented by the aforementioned prerogative of management.

Whether a dispute is arbitrable depends upon a fair construction of the terms and scope of the collective bargaining agreement. *Industrial Trades Union of*

America vs. Woonsocket Dyeing Co. 122 F. Supp. 872. An analysis of the pertinent provisions of the agreement indicates clearly that the dispute relates to the "meaning and application" of the agreement and that the contentions of the parties in this respect are not frivolous but are fairly and justly maintained and advanced. It is only by an interpretation of the various provisions of the agreement that the dispute may be resolved. This is exactly the type of disagreement which the parties agreed by Article VIII-B was subject to arbitration. It must, therefore, be held that the dispute is arbitrable under the contract. See: *Textile Workers Union of America, C I O vs. American Thread Company*, 113 F. Supp. 137 (1953); *Wilson Bros. vs. Textile Workers of America, C I O* ___ F. Supp. ___(1954), (27 CCH Labor Cases, CASE No. 69,026, p. 88, 390); *Insurance Agents' Inter. Union vs. Prudential Insurance Co.* 122 F. Supp. 869 (1954); and *Local No. 379, etc. vs. Jacobs Mfg. Co.* 120 F. Supp. 228 (1953). Hence, the refusal of the defendant to submit the termination dispute to arbitration, after written request therefor by the plaintiffs, constitutes a breach by the defendant of the collective bargaining agreement in full force and effect between the parties.

A second point raised by the defendant concerns the power of this Court to enforce an arbitration provision in a collective bargaining agreement. It contends that a federal court does not have any authority to grant specific performance of arbitration contracts under Section 301 of Taft-Hartley Act. This Court, however, has already expressed itself in that regard in a matter involving this same lawsuit. *United Textile Workers of America, A. F. L. Local 1802, et al vs. Goodall-Sanford, Inc.*, 129 F. Supp. 859 (April 1, 1955). In that decision, this Court held that it had jurisdiction to afford equitable relief under Section 301 of the Taft-Hartley Act, relying

upon the authorities of *Milk and Ice Cream Drivers. v. Gillespie Milk Prod. Corp.*, 6th Cir., 203 F. 2nd 650; *Textile Workers Union v. American Thread Co.*, D. C. Mass., 113 F. Supp. 137; *Local 207, Etc. v. Landers, Frary & Clark*, D. C. Conn., 119 F. Supp. 877; *Insurance Agents' Inter. Union v. Prudential Ins. Co.*, D. C. Pa., 122 F. Supp. 869; *The Evening Star Newspaper Co. v. Columbia Typo Union*, D. C. D. Co., 124 F. Supp. 322; *Industrial Trades Union v. Woonsocket Dyeing Co.*, D. C. R. I., 122 F. Supp. 872. On the basis of these cases and particularly *Local 207, Etc. vs. Landers, Frary & Clark*, supra and *Textile Workers Union v. American Thread Co.*, supra, this Court may compel arbitration, as provided by the terms of a voluntary contract. Contra: *Local 205, United Electrical, Radio and Machine Workers of America, v. General Electric Co.*, D. C. Mass., 27 CCH labor cases, CASE No. 69,085, p. 85,567.

The recent Supreme Court decision of *Association of Westinghouse Salaried Employees v. Westinghouse Electric Co.*, 75 Sup. Ct. 488, cited by the defendant in support of its aforementioned contention, is not in point. It held merely that the language of Section 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained, to receive compensation for services rendered his employer. The case does not clarify the scope of power of federal courts in suits under Section 301 of the Taft-Hartley Acts since there was a 3-2-1-2 split in that regard. Furthermore, this Court need not decide whether it has jurisdiction to determine the actual controversy itself because, by deciding that the dispute is arbitrable, that point is not reached. *Wilson Bros. vs. Textile Workers of America C I O*, Supra.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment with regard to the matter of specific performance of the arbitration clauses of the collective bargaining agreement, be and hereby is, GRANTED.

Counsel for the plaintiffs is directed to prepare a Decree in conformity with the views expressed in this Opinion.

JOHN D. CLIFFORD, JR.,
Judge, United States District Court,
for the District of Maine

Portland, Maine.
June 1, 1955.

DECREE

This cause having come on for hearing on plaintiffs' motion for summary judgment regarding the prayer of the complaint, as amended, seeking specific performance of the arbitration clauses of the collective bargaining agreement in force and effect between the parties and after hearing and argument, the Court having rendered its findings of fact and conclusions of law and having granted the motion of plaintiffs for summary judgment.

IT IS ORDERED, ADJUDGED AND DECREED, AS FOLLOWS:

(1) Within ten (10) days from the date hereof the parties shall undertake, in accordance with the provisions of Article VIII, B, (1) of the collective bargaining contract executed by the parties, to agree upon, and if such agreement has been reached the parties shall designate, a person to serve as a single arbitrator of the dispute here involved. Said designation shall be filed with the Clerk of this Court.

(2) If at the expiration of said ten (10) days, the parties have failed to agree upon and to appoint such

single arbitrator, and to file said appointment with the Clerk of this Court, the Court itself will designate a person to serve as the single arbitrator.

(3) Within ten (10) days after said single arbitrator has been designated by the parties or appointed by the Court, as the case may be, or within such further time as the said arbitrator may himself see fit to allow upon application made to him by any of the parties for an extension of time, the parties shall submit and present to the said arbitrator as the controversy to be heard and decided by him, following such procedures as said arbitrator may direct not inconsistent herewith or with the provisions of Article VIII, B of the collective bargaining agreement in force and effect between the parties, the following matters:

a. Did Goodall-Sanford, Inc. violate the collective bargaining agreement between Goodall-Sanford, Inc., on the one hand, and United Textile Workers of America, A. F. L. Local 1802, and United Textile Workers of America, A. F. L., on the other hand—(as constituted by the agreement executed by the said parties on October 1, 1951 and renewed on July 29, 1953, and as supplemented by the supplemental agreement executed by said parties on June 21, 1954)—when Goodall-Sanford, Inc. purported to terminate the employment, as of January 29, 1955, and as of February 18, 1955, of various of its production and maintenance employees at Sanford and Springvale, Maine, (approximately 1400 in number) on the ground that because of continued heavy losses, Goodall-Sanford, Inc. had decided to terminate all operations of its mills in Sanford and Springvale and had inaugurated a program of liquidation and that owing to the liquidation proceedings in Mills A, B, C, and Printworks, and the subsequent sales of the

mills, the department in which each employee thus purportedly terminated had previously worked had been completely shut down and would not reopen;

b. If a violation of contract was committeed by Goodall-Sanford Inc. what must be done by Goodall-Sanford; Inc. appropriately and fully to remedy the said wrong to the employees affected, in accordance with the terms and provisions of the entire collective bargaining agreement.

(4) The decision rendered by the said single arbitrator shall be final and binding on the parties herein:

Dated at Portland, Maine, this 13th day of June, A. D. 1955.

JOHN D. CLIFFORD, JR.,
Judge, United States District Court for the District of Maine.

NOTICE OF APPEAL.

Notice is hereby given that Goodall-Sanford, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the First Circuit from

(1) The order entered in this action on March 23, 1955, denying defendant's motion to dismiss the amended Complaint for want of jurisdiction;

(2) The order entered in this action on June 1, 1955, denying the defendant's motion to dismiss the amended Complaint as further amended for want of jurisdiction;

(3) The order and opinion of the District Court entered on June 1, 1955, ruling that the District Court had jurisdiction to afford equitable relief under Section 301 of the so-called Taft-Hartley Act, and granting plaintiffs' motion for summary judgment with regard to the matter of specific performance of the arbitration clauses of the collective bargaining agreement, and

(4) The decree entered by the District Court on June 13, 1955, pursuant to the order and opinion entered on June 1, 1955.

By
DRUMMOND AND DRUMMOND,
WILLIAM B. MAHONEY,
Attorneys for Goodall-Sanford, Inc.

June 27, 1955.

MOTION TO SUSPEND OPERATION OF DECREE FOR SPECIFIC PERFORMANCE PENDING APPEAL TO COURT OF APPEALS

The defendant moves that, in accordance with the provisions of Rule 62, Paragraphs c and d of the Federal Rules of Civil Procedure, this Court enter an order suspending the operation of the decree entered in this cause on June 13, 1955, pursuant to an order and opinion entered on June 1, 1955, during the pendency of the appeal filed by the defendant in this cause on June 27, 1955, upon such terms as this Court considers proper for the security of the rights of the plaintiffs.

Dated June 27, 1955.

By
DRUMMOND AND DRUMMOND,
WILLIAM B. MAHONEY,
Attorneys for Goodall-Sanford, Inc.

ORDER

Motion granted. Operation of decree entered on June 13, 1955, pursuant to order and opinion entered on June 1, 1955, suspended pending appeal, without bond.

JOHN D. CLIFFORD, JR.,
Judge United States District Court.

POINTS UPON WHICH THE DEFENDANT INTENDS TO RELY ON THE APPEAL:

1. That Section 301 of the Labor Management Relations Act of 1947 does not grant to the District Courts of the United States any jurisdiction, where no other ground for Federal jurisdiction is alleged or claimed.

2. That in no event does Section 301 of the Labor Management Relations Act of 1947 grant to the District Courts of the United States equitable jurisdiction to grant injunctions or compel specific performance of arbitration clauses in a collective bargaining agreement.

3. That the dispute between the defendant (employer) and the plaintiff (union) parties to the collective bargaining agreement with respect to termination by the employer of employment of its employees in the bargaining unit, then on layoff status and the removal of their names from the payroll records of the employer on the ground that the department in which they worked had been completely shut down and would not reopen, which termination was a part of a program of complete liquidation of all operations of the employer's mills, due to continued heavy losses, is a labor dispute within the meaning of the Norris-LaGuardia Act.

4. That said dispute, being a labor dispute, the District Court is without jurisdiction to decree specific performance of an agreement to arbitrate such a dispute because of the prohibitions of the Norris-LaGuardia Act.

5. That the dispute between the plaintiff (union) and defendant (employer) as to termination of services of the defendant's employees in the bargaining unit, and their removal from the payroll records of the employer, on the ground that the department in which each employee had previously worked had been completely shut down and

would not reopen, which termination was part of a program of complete liquidation of the employer's mills due to continued heavy losses, is not an arbitrable issue under the collective bargaining agreement then in effect between the defendant (employer) and the plaintiff (union) at the time of such termination.

6. Whether the decision of the District Court is controlled by Federal Law or the law of the State of Maine, in which State the collective bargaining agreement between the defendant (employer) and the plaintiff (union) was entered.

7. If decision is controlled by Federal law, whether provisions in the collective bargaining agreement between the plaintiff (union) and the defendant (employer) for final binding arbitration of future disputes relating to the meaning and application of the agreement are valid and enforcible by a decree for specific performance under the Federal law.

8. If decision is controlled by the law of Maine, whether provisions in the collective bargaining agreement between the plaintiff (union) and the defendant (employer) for final binding arbitration of future disputes relating to the meaning and application of the agreement are valid under the law of Maine and enforcible by a decree of specific performance.

GOODALL-SANFORD, INC.

By DRUMMOND AND DRUMMOND,
WILLIAM B. MAHONEY
Its Attorneys.

[fols. 49-50] Argument and submission—November 3, 1956 (omitted in printing).

United States Court of Appeals
For the First Circuit

No. 5029.

GOODALL-SANFORD, INC.,
DEFENDANT, APPELLANT,

v.

UNITED TEXTILE WORKERS OF AMERICA, AFL, LOCAL 1802 ET AL.,
PLAINTIFFS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE.
[129 F. Supp. 859; 131 F. Supp. 767]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

William B. Mahoney, with whom *Daniel T. Drummond, Jr.*, *Douglas M. Orr*, and *Drummond & Drummond* were on brief, for appellant.

Sidney W. Wernick, with whom *Berman, Berman & Wernick* was on brief, for appellees.

OPINION OF THE COURT.
April 25, 1956.

MAGRUDER, *Chief Judge*. This case is the third one decided today on problems relating to the power of a federal district court to compel arbitration in accordance with a collective bargaining agreement. However, the instant case reached this court in a posture different from that of the other two; and it involves additional considerations not present in *Local 205, United Electrical Workers v. General Electric Co.*, No. 4980,

or *Newspaper Guild v. Boston Herald-Traveler Corp.*, No. 4983.

Plaintiffs herein, a local labor organization and its parent national union, represented employees of defendant Company at plants in Sanford and Springvale, Maine, in an industry affecting commerce. The last collective bargaining agreement between the parties, as renewed in June, 1954, provided that it was to "continue in full force and effect" until July 15, 1955. The past tense is used advisedly, for defendant, because of continued heavy losses, commenced to terminate all operations at its Sanford and Springvale mills and inaugurated a program of liquidation during the second half of 1954. Production was limited to "running out" products in process, at the completion of which the several mills were shut down completely. By April, 1955, all production operations had ended and all of the real estate and buildings had been sold; the corporation was to go out of existence after liquidating completely.

On December 29, 1954, and February 18, 1955, certain groups of employees (totaling approximately 1400) were notified that their respective employment with the Company was being terminated as of those dates and that their names were being removed from the payroll records. Although the workers were already on lay-off status, those actions were significant with respect to various "fringe benefits" provided in the collective bargaining agreement, including group life, medical, and hospitalization insurance, pensions, and vacation pay. The Union protested each of these notifications, achieving a month's delay as to the first group of terminations, and subsequently it requested arbitration of the entire problem in accordance with the contract, which will be described in some detail later in this opinion. The Company declined to

arbitrate, deeming the terminations not an arbitrable matter under the contract. On March 15, 1955, the Union filed its complaint in the present action, invoking § 301 of the Taft-Hartley Act (61 Stat. 156) as the basis for jurisdiction, and praying for an order to compel arbitration and for interlocutory injunctive relief. A restraining order and a preliminary injunction were granted, 129 F. Supp. 859, which forbade the termination, but on May 20, 1955, Judge Clifford dissolved the preliminary injunction. No questions touching upon the granting or dissolving of the injunction are presented on this appeal. In an opinion and order of June 1, 1955, 131 F. Supp. 767, the district court granted the Union's motion for summary judgment on its prayer for specific performance of the arbitration provision, and subsequently entered a decree which will be described later. The Company appeals from that decree.

I.

At the outset we must note a question as to whether the order and decree of the district court are appealable. The decree recites, as did the arbitration provision of the contract, that the decision of the arbitrator "shall be final and binding" on the parties. Thus it seems that the court did not intend to reserve jurisdiction to confirm the arbitrator's decision. Perhaps it could not have done so with respect to this contract calling for a "final and binding" award, since the Arbitration Act, 9 U. S. C. § 9, seems to authorize confirmation of an award by summary proceedings in the district court only when the contract includes an express stipulation for entry of judgment upon the award. See *Hyman v. Pottberg's Executors*, 101 F. 2d 262, 266 (C. A. 2d, 1939); *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F. 2d 1038 (C. A. D. C. 1932); S. Rep. No. 536, 68th Cong., 1st Sess. 1 (1924). It must be recognized,

however, that even without a reservation of jurisdiction to confirm the eventual award, a decree ordering parties to arbitrate obviously does not purport to adjudicate the merits of the controversy or finally terminate it. And where arbitration is sought through the related procedure for stay of a pending action pursuant to § 3 of the Arbitration Act, an appeal prior to the arbitration is only available, under 28 U.S.C. § 1292(1), whether the stay is granted or denied, if the pending action was "legal" rather than "equitable" in character. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955). The appeal at that stage may be unavailable under the test of the *Baltimore Contractors* case even where a request for an affirmative order compelling the other party to arbitrate was joined with the request for a stay. *Wilson Bros.* v. *Textile Workers Union*, 224 F.2d 176 (C.A. 2d, 1955); *Turkish State Railways Administration* v. *Vulcan Iron Works*, 230 F.2d 108 (C.A. 3d, 1956); cf. *Schoenamsgruber* v. *Hamburg American Line*, 294 U.S. 454 (1935) (§ 8). Chief Judge Clark has suggested that where an order to compel arbitration is granted in an independent proceeding under § 4, the appeal likewise should be denied, not only to make availability of appeal more consistent with the practice under other sections of the Arbitration Act, but also because an appeal prior to the arbitration may be "disruptive and delaying." See *Stathatos* v. *Arnold Bernstein Steamship Corp.*, 202 F.2d 525, 527 (C.A. 2d, 1953). There is much force to this view, although we doubt that a completely consistent pattern of appeal could be achieved in view of the variant situations illustrated by the cases already cited. At any rate, we are more persuaded by some of the older precedents, which viewed a § 4 proceeding as completed upon the granting of the only relief sought, an order of the court compelling arbitration, and thus held that order to be "final" in the sense of 28 U.S.C. § 1291.

Krauss Bros. Lumber Co. v. *Louis Bossert & Sons, Inc.*, 62 F.2d 1004 (C.A. 2d, 1933); *Continental Grain Co.* v. *Faust & Russell, Inc.*, 118 F.2d 967 (C.A. 9th, 1941). This holding, which we adopt here, contributes consistency at least to the extent that appeal is equally available whether the court grants or denies an order to arbitrate, for dismissal of a § 4 petition on the merits is clearly a final judgment.

II.

The district court did not proceed under the Arbitration Act (9 U.S.C. §§ 1 *et seq.*) in this case, but found its authority to compel arbitration in § 301, relying upon some of the decisions discussed in our opinion today in *Local 205* v. *General Electric Co.*, No. 4980. For the reasons stated in the latter opinion, we do not accept this approach. But our holding in the *General Electric* case applies here; if the terms of the Arbitration Act are satisfied, the decision to compel arbitration was within the power of the district court.

It would be merely dilatory at this stage to remand this case for amendment of pleadings to allege compliance and defenses under the Arbitration Act. In the other two cases decided today, wherein the district court had denied an order to arbitrate, remand for a decision on the merits was necessary, and so affording an opportunity to amend was appropriate. Here the district court has ruled on the merits, and we may proceed to review that decision, after determining from the record that the case substantially complies with the requisites of the Arbitration Act.

The arbitration clause at issue comes within the scope of § 2 of that Act. Article VIII of the contract provides that

> "any dispute which relates solely to the meaning and application of this Agreement or any individual grievance

> may be referred to arbitration by written notice by either party to the other. . . . Arbitration shall be in accordance with the following procedure: . . .
>
> 2. The Arbitrator shall have no power to add to or to subtract from the terms of this Agreement. . . ."

The four-step grievance procedure that precedes arbitration in Art. VIII was not carried out here, although conferences somewhat equivalent to step 4 took place. At any rate, the Company may be taken to have waived compliance with that procedure by its failure to allege that ground in resisting arbitration in the court below. The proceedings in that court in substance were equivalent to the procedure of § 4 of the Act. There was no issue over "the making of the agreement for arbitration or the failure to comply therewith," other than the question of arbitrability of the dispute. This the court determined upon motion for summary judgment. Since there was no controverted issue of material fact and the question of arbitrability turned only upon interpretation of the written contract, summary judgment was an appropriate vehicle for the decision, not inconsistent with the provision of § 4 for trial to a jury or the court of controverted issues regarding the making or breach of the agreement to arbitrate. See also part IV of our opinion in the *General Electric* case.

The decree ordered the parties to agree upon a person to serve as arbitrator but provided for selection of an arbitrator by the court if the parties failed to agree upon one within ten days. The order to select an arbitrator was consistent with Art. VIII of the contract, and the power of the court to make the appointment in the event the parties failed to do so is expressly conferred by § 5 of the Arbitration Act. The decree also provided, as already noted, that the award was

to be "final and binding," and it framed the questions to be submitted to arbitration as follows:

> "*a.* Did Goodall-Sanford, Inc. violate the collective bargaining agreement . . . [by taking the action described at the beginning of our opinion] . . . ;
>
> *b.* If a violation of contract was committed by Goodall-Sanford, Inc. what must be done by Goodall-Sanford, Inc. appropriately and fully to remedy the said wrong to the employees affected, in accordance with the terms and provisions of the entire collective bargaining agreement."

This formulation of the issues in dispute is accurate and serves to limit the arbitrator to the matters deemed arbitrable by the court, a limitation of which defendant cannot complain. Defendant has argued here that the second question, taken with the provision for finality, is somehow improper. We do not understand this. Arbitrators conventionally award appropriate relief, upon finding a breach of contract; there would be little point to arbitration otherwise, and the parties must have understood that in placing an arbitration clause in their collective bargaining agreement. The contract itself provides for finality of an award, so that provision of the decree has no particular effect. Of course, despite "finality" an award is subject to some degree of judicial review through 9 U.S.C. §§ 10-11 or other appropriate proceedings. See *Hyman v. Pottberg's Executors*, supra, 101 F.2d at 266.

In summation, we find no jurisdictional or procedural error in the action of the district court, nor any substantial deviation from the procedure that would have been followed under the Arbitration Act. Accordingly, we turn to the merits of the decision below.

III.

The "merits" of a suit to compel arbitration, of course, do not include the ultimate issues of contract interpretation that determine the outcome of the controversy. Those are what the arbitrator will decide. What we must pass on here is only the district court's determination that the controversy is arbitrable. The court held "that the dispute relates to the 'meaning and application' of the agreement and that the contentions of the parties in this respect are not frivolous but are fairly and justly maintained and advanced." 131 F. Supp. at 771. It will be helpful now to set forth the relevant provisions of the contract. The arbitration paragraph itself was quoted in the last part of this opinion and so will not be repeated. It will also be recalled that the collective bargaining agreement had been extended in June, 1954, to "continue in full force and effect" until July 15, 1955.

Article VII, entitled "Termination of Employment," stated as follows:

> "A. Reasons for Termination: An employee's continuous service and his employment with the Company shall be terminated by:
>
> 1. Voluntary Quit.
>
> 2. Discharge for cause.
>
> 3. Absence from work for a period of eighteen (18) months or more for any reasons other than to fill a Union position to which the employee was elected or appointed or where an entire operation has been discontinued."

Eligibility to be paid for the annual summer vacation was given in Art. V in these terms:

"B. Eligibility Requirements: During the term of this agreement an employee on the payroll of the Company on June 1st of the vacation year and who has worked at least 900 hours in the twelve-month period from June 1 of the preceding year to May 31 of the vacation year (both dates included) shall be eligible for vacation with pay. . . ."

Subsequent paragraphs provided for the computation of the amount of "vacation pay" on the basis of the average hourly earnings of employees in the last week or month preceding June 1 in which they worked, and for payment of a "vacation bonus," a percentage of wages for the year ending June 1, to employees who had been "in the continuous employment of the Company" for certain periods but who did not qualify for vacation pay under the foregoing provisions.

It will be seen that eligibility for vacation pay or vacation bonus was tied to existence of the employment status on a given date, June 1, regardless of whether the employee had worked continuously throughout the preceding year or was working on the date in question, with vacation pay as such limited to those who had worked at least 900 hours during the year (approximately 23 weeks on the normal workweek of Art. III). The district court found that eligibility for the other benefits described in the complaint—life, health, and accident insurance and pensions—also was related to the employment status, with partial benefits continuing during a lay-off but not if the employment was terminated. See 129 F. Supp. at 864-65. The preliminary injunction granted by the district court in that opinion seems to have afforded the principal relief pertinent to those benefits; and it appears that the vacation pay-vacation bonus issue is the major, if

not sole matter in the case at this time. The injunction was lifted on May 20, 1955, and counsel informed us at the argument that the Company carried out the termination of the employment of the persons involved before June 3. The Union's contentions are that this action (delayed since February by the injunction) violated the provisions of Art. VII as to how employment may be terminated, and that those provisions are exclusive. The Company argues to the contrary.

In addition, both the Union and the Company may find support in other articles of the contract, such as these:

"ARTICLE I

D. Rights of Management: The management of the Company's business, including . . . the direction of its working force and the right to hire, lay-off and suspend employees is vested exclusively in the Company, subject to the provisions of this agreement."

"ARTICLE XIII

. . . this Contract contains all matters on which the parties are mutually agreed. If at any time while this agreement is in effect the parties desire to modify, amend, or add to it in any respect either retroactively or prospectively they may do so by mutual assent. . . ."

"ARTICLE XVI

The parties acknowledge that during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by [illegible] from the area of collective bargaining, and that the understandings and agreements arrived at by the parties

after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Company and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this agreement."

It is not our function here to determine whether a reconciliation of all these contract provisions will support or refute the Union's contentions. We believe that the provisions set forth at length above do indicate, as the district court held, that the facts of this case involve a "dispute which relates solely to the meaning and application" of the contract, in the words of the arbitration clause, and that the contentions of the party seeking arbitration thereunder are not frivolous or baseless.

However, defendant argues that well-settled law entitles an employer to shut down an unprofitable business and terminate the employment of its employees, so that the termination of employment under those circumstances cannot create an arbitrable issue under a collective bargaining agreement. The point is well stated in defendant's brief in these words:

"A collective bargaining agreement is a living thing to govern the relationship of the parties during the life of the agreement while the business is being operated as

> a going business. It certainly does not bind the employer to carry on an unprofitable business. The decision to completely and finally discontinue an unprofitable business is a function of management and the collective bargaining agreement was not designed to limit that function."

It may be that existence of a collective agreement with a union for a fixed term does not affect the common law status of the individual employments as contracts terminable at will, except in so far as the union contract expressly limits the employer's power to terminate. See *United States Steel Corp.* v. *Nichols*, 229 F.2d 396 (C.A. 6th, 1956); 1 Teller, Labor Disputes and Collective Bargaining § 169 (1940). And it may also be that, as a result, the act of terminating employment because a department or an entire business is closed cannot be prevented, or made the basis for liability to a lawsuit or to arbitration under a "discharge for cause" provision of a union contract. See *Local Union No. 600* v. *Ford Motor Co.*, 113 F. Supp. 834 (E.D.Mich. 1953); *Machine Printers Beneficial Assn.* v. *Merrill Textile Print Works, Inc.*, 12 N.J. Super. 26, 78 A.2d 854 (App.Div. 1951); *Industrial Trades Union* v. *Woonsocket Dyeing Co., Inc.*, 122 F. Supp. 872 (D.R.I. 1954). We do not have to make a decision on either of those propositions, for the situation before us is distinguishable.

It cannot be doubted that a collective bargaining agreement could be drawn to cover the problems arising in the eventuality of an employer's going out of business. For example, see the collective bargaining agreement dealt with in *Bigerly* v. *Duke Power Co.*, 217 F.2d 803 (C.A. 4th, 1954). Even without an express reference to that possibility in the contract, in view of the increasingly complex use of compensation in the

form of "fringe benefits," some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern. See *Matter of Potoker*, 286 App.Div. 733, 146 N.Y.S.2d 616 (1st Dept. 1955). Here the eligibility for vacation pay was stated in Art. V to be dependent on existence of the employment relationship on a given date, prior to the end of the contract term. The parties must have contemplated that on this date particular employees might have been away from work for a considerable time subsequent to completion of the minimum 960 hours of work whereby they had earned the vacation pay. Without deciding whether this contract term does have continued effect in the circumstance of the employer's good faith decision to terminate all operations prior to June 1, 1955, we hold that the question thus posed is an arbitrable one under this contract on the facts of this case. Cf. *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (S.D.N.Y. 1954), appeal dismissed 224 F.2d 176 (C.A.2d, 1955); *Matter of Potoker*, supra.

The decree of the District Court is affirmed.

[fol. 63] In United States Court of Appeals

Judgment—April 25, 1956

This cause came on to be heard on the record on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed.

By the Court: (S.) Roger A. Stinchfield, Clerk.

Thereafter, on May 9, 1956, mandate was stayed until further order of Court.

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 65] Supreme Court of the United States, October Term, 1956

No. 262

Goodall-Sanford, Inc., Petitioner,

vs.

United Textile Workers of America, A. F. L. Local 1802, et. al.

Order Allowing Certiorari—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted limited to questions 1, 2, 3, 4 and 7 as set out in the petition for writ of certiorari and to the question raised by the respondent; namely, the appealability of an order granting specific performance of an arbitration convenant which read as follows:

"1. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the

United States jurisdiction where no other ground for Federal jurisdiction is alleged or claimed.

2. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States equitable jurisdiction to grant injunctions or compel specific performance of arbitration clauses in a collective bargaining agreement.

3. Whether the District Court has jurisdiction to decree specific performance of an agreement to arbitrate such a dispute, despite the prohibitions of the Norris-LaGuardia Act.

4. Whether the United States Arbitration Act, 9 U. S. C. Sec. 1 et seq. is applicable to an agreement to arbitrate in a collective bargaining agreement.

7. Whether a union may prosecute, by way of arbitration procedure in a collective bargaining agreement, the peculiarly personal rights of individual employees to recover vacation pay, and judicially compel arbitration for that purpose."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration or decision of this application.

(2984-3)

No. 262

In the Supreme Court of the United States

October Term, 1956

GOODALL-SANFORD, INC.

Defendant-Appellant, Petitioner

vs.

UNITED TEXTILE WORKERS OF AMERICA, A. F. L., LOCAL 1802, and UNITED TEXTILE WORKERS OF AMERICA, A. F. L.

Plaintiffs-Appellees, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX

CITATIONS

CASES: PAGE

In the Supreme Court of the United States

October Term, 1956

GOODALL-SANFORD, INC.
Defendant-Appellant, Petitioner

vs.

UNITED TEXTILE WORKERS OF AMERICA, A. F. L. LOCAL 1802 and UNITED TEXTILE WORKERS OF AMERICA, A. F. L.
Plaintiffs-Appellees, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Goodall-Sanford, Inc., your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on April 25, 1956.

OPINIONS BELOW

The opinion of the District Court is reported in 131 Fed. Supp. 767 and is set forth in full R. 33-43, inc. The opinion of the Court of Appeals is reported in 30 CCH, LC P, 69910 and is printed in full, R. 51-63 and as

Appendix (C) hereto. The opinion in *Local 205, United Electrical R & M. Workers of America vs. General Electric Company*, decided by the Court of Appeals at the same time as the case at bar is reported in 30 CCH, LC P. 69908 and printed as Appendix (B) hereto.

JURISDICTION

The jurisidiction of this Court is invoked under the provisions of 28 U. S. C. A. Par. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States jurisdiction where no other ground for Federal jurisdiction is alleged or claimed.

2. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States equitable jurisdiction to grant injunctions or compel specific performance of arbitration clauses in a collective bargaining agreement.

3. Whether the District Court has jurisdiction to decree specific performance of an agreement to arbitrate such a dispute, despite the prohibitions of the Norris-LaGuardia Act.

4. Whether the United States Arbitration Act, 9 U. S. C. Sec. 1 et seq. is applicable to an agreement to arbitrate in a collective bargaining agreement.

5. Whether, for the purpose of decision upon a motion by a plaintiff for summary judgment on the pleadings, the allegations of material facts in the defendant's answer are admitted under Rule 56 of the Federal Rules of Civil Procedure.

6. Whether the District Court, in the first instance, or the Court of Appeals, on appeal, in considering a motion for summary judgment on the pleadings, is permitted to disregard material facts so admitted by the motion.

7. Whether a union may prosecute, by way of arbitration procedure in a collective bargaining agreement, the peculiarly personal rights of individual employees to recover vacation pay, and judicially compel arbitration for that purpose.

STATUTES INVOLVED

The Statutes involved are the United States Arbitration Act, 61 Stat. 669, Sec. 1 et seq. (1947) as amended September 3, 1954, 68 Stat. 1233, 9 U. S. C. Sec. 1 et seq., the Labor Management Relations Act, 61 Stat. 136 (1947) 29 U. S. C. 141 et seq. and the Norris-LaGuardia Act, 47 Stat. 70 (1932) 29 U. S. C. 101, et seq.

STATEMENT OF THE CASE

The statement of the case, as presented to the District Court is printed R. 33-40, inc. and, in the interest of brevity, is not reprinted here.

The statement of the case, as presented to the Court of Appeals, is printed R. 52-53, inc. and in Appendix (C) and, in the interest of brevity, is not reprinted here.

The case involves a petition by a labor organization to the United States District Court for the District of Maine, Southern Division, to compel specific performance of the arbitration provisions of a collective bargaining agreement between United Textile Workers of America, A. F. L. Local 1802, and United Textile Workers of

America, A. F. L. Plaintiffs, and Goodall-Sanford, Inc., Defendant.

The dispute arose when the Union protested the action of the Company in terminating employment of employees then on lay-off status when, because of heavy losses the defendant corporation had decided to terminate all operations and had inaugurated a program of complete liquidation of the mill properties.

The defendant refused the demand of the Union for arbitration of the dispute on the ground that the dispute was not arbitrable under the collective bargaining agreement.

Termination of all production operation of the mills and the sale of all real estate and buildings had been completed by April 5, 1955, approximately two months prior to the date of decision in the District Court.

The collective bargaining agreement is set forth in full in Exhibit A (R. 26) and the pertinent provisions thereof are quoted in the opinion and order of the District Court of June 1, 1955, R. 35-37, and, in the opinion of the Court of Appeals, R. 55, 58 and 60.

The only ground for jurisdiction of the District Court alleged in the original and amended complaint is Sec. 301 of Title III of the Labor-Management Relations Act of 1947, 29 U. S. C. Sec. 185.

The District Court denied Defendant's motion to dismiss the amended complaint (R. 4) and, on June 1, 1955, denied the defendant's motion to dismiss the complaint, as further amended (R. 5). On June 1, 1955 the District Court entered an opinion and order granting Plaintiffs' motion for summary judgment (R. 31-32)

and, on June 13, 1955, entered a decree directing arbitration of the dispute (R. 43). An appeal to the Court of Appeals for the First Circuit was seasonably perfected by the Defendant from the denial of the Defendant's motion to dismiss and the granting of the Plaintiffs' motion for summary judgment and the decree thereon (R. 45).

No claim was made in the Plaintiffs' original or amended pleadings in the District Court that the Plaintiffs were demanding the relief of specific performance under the United States Arbitration Act, and no allegation or proof of compliance by the Plaintiffs with the requirements of said Act was made. The decision of the District Court was bottomed squarely on its interpretation of the provisions of Section 301, Labor-Management Relations Act, as granting to that Court jurisdiction to grant the relief of specific performance of the arbitration provisions of the collective bargaining agreement.

At no time, in the District Court or in the Court of Appeals, either in the written briefs or in oral argument, was any claim made by the Plaintiffs that relief was sought under the United States Arbitration Act, or that the provisions of that Act had been complied with by the Plaintiffs.

The Court of Appeals disagreed with the District Court as to its authority to compel arbitration under Sec. 301 (R. 55) and held (a) that the United States Arbitration Act applied to the controversy (b) that the Defendant had waived compliance by the Plaintiffs with the requirements of the Arbitration Act (R. 56), (c) that as there was no controverted issue of material fact, summary judgment was the appropriate vehicle for decision (R. 56) and (d) that an arbitrable issue was presented on the facts in the case (R. 63). On April 25, 1956 the

Court of Appeals rendered its opinion, affirming the decree of the District Court (R. 51-63) and, on the same day, entered judgment (R. 63) and, on May 9, 1956, stayed the mandate until further order of Court (R. 63).

ARGUMENT ON REASONS FOR GRANTING THE WRIT

There are special and important reasons for this Court to exercise its sound judicial discretion and to grant the writ of certiorari prayed for in this petition on each of the questions presented.

Argument is made on each of the questions presented as set forth on Page 2 of this petition, and, in the interest of brevity, the questions presented are not repeated as a caption for each subdivision of this argument, but are referred to by number.

Question No. 1

There is a direct conflict between the decisions in the Courts of Appeal and the decision of this Court in the Westinghouse case as to whether Section 301 grants jurisdiction to the district courts, where no other ground for Federal Jurisdiction is alleged or claimed.

Lincoln Mills of Alabama vs. Textile Workers Union of America, CA-5, 230 Fed. 2nd, 81 (1956) holds that Section 301 grants to Federal courts jurisdiction where violation of a collective bargaining agreement between an employer and a labor organization representing employees is asserted. See also *Shirley-Herman Co. vs. Internat'l. Hod Carriers, etc.* CA-2 (1950), 182 F. 2d 806 and *Signal-Stat Corporation vs. Local 475, U.E., Radio and Machine Workers of America (UE)*, CA-2 (7/2/56).

Goodall-Sanford, Inc. vs. U. T. W. A., Local 1802, CA-1 (1956) 30 CCH, LC Par. 69, 910; *Local 205 U. E. vs. General Electric Co.*, CA-1 (1956) 30 CCH, LC Par. 69, 908; *Newspaper Guild of Boston vs. Boston Herald Traveler Corporation* CA-1 (1956) 30 CCH, LC Par. 69,909, hold that Section 301 is to be interpreted as denying jurisdiction over such a controversy only where the union is seeking a remedy which the individual employee equally could enforce in a suit on his personal cause of action.

Each of these interpretations is in conflict with the decision of this Court in the Westinghouse case. *Association of Westinghouse Salaried Employees vs. Westinghouse Elec. Corp.*, 348 U. S. 437; 75 Sup. Ct. 488, 99 L. Ed. 368. They are also in conflict with the interpretation of Section 301 in *International Garment Workers' Union, A. F. L. vs. Jay-Ann Co.*, CA5, 228 Fed. 2nd, 632 at 635 (1956).

These conflicts in the decisions can be resolved only by a decision of this Court and it is in the public interest that they be so resolved.

Question No. 2

The Federal Dstrict Courts and Courts of Appeal are in hopeless conflict on the question as to whether Sec. 301 grants to the United States District Courts equitable jurisdiction to grant injunctions or to compel specific performance of arbitration clauses in a collective bargaining agreement.

A compendium of the cases holding either way in each Circuit is printed in Appendix (A).

The cases holding that Sec. 301 does grant equitable jurisdiction are not only in conflict with the decisions in other Circuits which have reached opposite results, but are in direct conflict with the decision of this Court in the Westinghouse Case. *Association of Westinghouse Salaried Employees vs. Westinghouse Elec. Corp.*, 348 U. S. 437; 75 Sup. Ct. 488, 99 L. Ed. 368.

Question No. 3

What has heretofore been said concerning the conflict between the Circuits with respect to Question No. 2 applies with equal force to this Question No. 3.

A compendium of cases holding either way is printed in Appendix (A).

Question No. 4

There is a complete and irreconcilable conflict between the decisions of the Court of Appeals in this case and in the General Electric case, decided at the same time, and the Lincoln Mills case, 230 F. 2nd, 81, CA 5th, 1956. The conflicts between the circuits are pointed up in the opinion of the Court of Appeals in the General Electric Case Appendix (B) (P. 22-23) attached hereto, and in the Lincoln Mills case, Pages 85-86.

We understand that a petition for certiorari to this Court has been, or will be filed in both the General Electric and Lincoln Mills cases.

A compendium of the cases holding that the Arbitration Act is not applicable to a collective bargaining agreement, and of cases holding the Act applicable, and of cases excluding consideration of the applicability of the Arbitration Act because of the Court's decision with respect to

the jurisdiction conferred by Sec. 301, are set forth in Appendix (A) attached hereto.

Questions No. 5-6

It is important that the Federal Rules of Civil Procedure receive uniform application in the Federal Courts.

The Defendant claims that all material facts alleged in the Defendant's answer are admitted for the purpose of decision on the Plaintiffs' motion for summary judgment under Rule 56 and that such admissions of fact cannot be ignored or disregarded in the Court's consideration and decision in the case.

Both the District Court and the Court of Appeals, in deciding that an arbitrable issue was presented by the pleadings in the Defendant's refusal to arbitrate the dispute over the discontinuance of the business and termination of employment of employees by reason thereof (Opinion of District Court, R. 41—Opinion of Court of Appeals R. 63) ignored or disregarded the admission of the Plaintiffs, by their motion for summary judgment, that "the decision to discontinue all operations * * * carried with it also the right to terminate employment of employees *and nothing in the collective bargaining agreement covered, or purported to cover such a cessation of business and termination of employment*". (emphasis supplied) (R. 28).

Under Article VIII B of the collective bargaining agreement between the Plaintiffs and the Defendant (Page 35 of Exhibit A, R. 26), quoted in full (R. 36) only disputes which related solely to the meaning and application of the agreement or any individual grievance could be arbitrated. Since Plaintiffs admitted, for the purpose of

their motion, that there was nothing in the agreement covering such cessation of business and termination of employment, an arbitrable issue could not be presented by the pleadings, unless the Court ignored or disregarded the Plaintiffs' admission.

The Defendant claims that this was such a departure from the accepted and usual course of judicial procedure as to call for this Court's exercise of its power of supervision.

Question No. 7

The Court of Appeals held (R. 59):

> "The District Court found that eligibility for the other benefits described in the complaint — life, health, and accident insurance and pensions — also was related to the employment status, with partial benefits continuing during a lay-off but not if the employment was terminated. See 129 F. Supp. at 864-65. The preliminary injunction granted by the district court in that opinion seems to have afforded the principal relief pertinent to those benefits, and it appears that the vacation pay-vacation bonus issue is the major, if not sole, matter in the case at this time."

Hence, at the time the Court of Appeals rendered its decision the ultimate purpose of the arbitration ordered by the Court could only be a money recovery of damages for failure to pay the vacation pay or bonus to the individual employees entitled thereto.

An order of a Federal Court directing an arbitration for such a purpose would be in direct conflict with the decision of this Court in the Westinghouse case and in

conflict with the decisions in *Textile Workers vs. Williamsport Textile Corp.*, 136 Fed. Supp. 407; *I. L. W. U. 142 vs. Libby, McNeill & Libby*, 221 Fed. 2nd, 225.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted on each of the questions presented.

Respectfully submitted,

DOUGLAS M. ORR,
Counsel for Petitioner.

APPENDIX A

Question No. 2

Cases in which district court is held to have jurisdiction to grant equitable relief under the authority of Section 301 of LMRA.

FIRST CIRCUIT

T. W. U. A. vs. American Thread Co. DC Mass. (1953) 113 F. Supp. 137.

U. T. W. A., Local 1802 vs. Goodall-Sanford, Inc., DC Me. (1955) 131 F. Supp. 767.

SECOND CIRCUIT

Wilson Bros. vs. T. W. U. A. DC SD NY (1954) 132 F. Supp. 163.

Local 207 vs. Landers, Frary & Clark DC Conn (1954) 119 F. Supp. 877.

Durkin vs. John Hancock Mutual Life Insurance Company DC SD NY (1950) 11 FRD 147.

Local 379 vs. Jacobs Mfg. Co., DC Conn (1953) 120 F. Supp. 228.

THIRD CIRCUIT

Independent Petroleum Workers of N. J. vs. Esso Standard Oil Co. CA-3 (6/26/56), 30 CCH. LC Par. 70,064.

Insurance Agents' International Union A. F. of L. vs. Prudential Insurance Co. DC ED Pa (1954) 122 F. Supp. 869.

FOURTH CIRCUIT

T. W. U. A. vs. Arista Mills Co., CA-4 (1951) 193 F. 2d 529.

T. W. U. A. vs. Aleo Mfg. Co. DC MD NC (1950) 94 F. Supp. 626.

SIXTH CIRCUIT

Milk and Ice Cream Drivers vs. Gillespie Milk Products Corp. CA-6 (1953) 203 F. 2d. 650.

Modine Mfg. Co. vs. I. A. M. CA-6 (1954) 216 F. 2d 326.

TENTH CIRCUIT

Mountain States Div. No. 17 C. W. A. vs. Mountain States Tel. & Tel. Co. DC Colo. (1948) 81 F. Supp. 397.

DISTRICT OF COLUMBIA

The Evening Star Newspaper Co. vs. Columbia Typo. Union DC D of C (1954) 124 F. Supp. 322.

APPENDIX A

Question No. 2

Cases in which district court is held not to have jurisdiction to grant equitable relief under the authority of Section 301 of LMRA.

FIRST CIRCUIT

W. L. Mead, Inc. vs. I. B. T., Local Union No. 25 CA-1 (1954) 217 F. 2d 6.

Local 205, U. E. vs. General Electric Company CA-1 (4/25/1956) 30 CCH LC Par. 69,908.

Local 205, U. E. vs. General Electric Company DC Mass (1955) 129 F. Supp. 665.

Goodall-Sanford, Inc. vs. U. T. W. A., Local 1802 CA-1 (4/25/56) 30 CCH LC Par. 69,910.

Newspaper Guild of Boston vs. Boston Herald-Traveler Corp. CA-1 (4/25/56) 30 CCH LC Par. 69,909.

Newspaper Guild of Pawtucket vs. Times Publishing Co. DC RI (1955) 131 F. Supp. 499.

SECOND CIRCUIT

Alcoa S. S. Co. Inc. vs. McMahon, CA-2 (1949) 173 F. 2d 567.

Local 937 vs. Royal Typewriter Co. DC Conn (1949) 88 F. Supp. 669.

THIRD CIRCUIT

Duris vs. Phelps Dodge Copper Products Corp. DC NJ (1949) 87 F. Supp. 229.

FOURTH CIRCUIT

Amazon Cotton Mill Co. vs. T. W. U. A. CA-4 (1948) 167 F. 2d 183.

Matson Navigation Co. vs. Seafarers International Union DC Maryland (1951) 100 F. Supp. 730.

Pilot Freight Carriers vs. Bayne DC WD SC (1954) 124 F. Supp. 605.

FIFTH CIRCUIT

Lincoln Mills vs. T. W. U. A. CA-5 (1956) 230 F. 2d 81.

T. W. U. A., CIO vs. Berryton Mills, DC ND Ga. (1951) 20 CCH LC Par. 66519.

SEVENTH CIRCUIT

United Packing House Workers of America vs. Wilson & Co. DC ND Ill. ED (1948) 80 F. Supp. 563.

NINTH CIRCUIT

I. L. W. U., Local 142 vs. Libby, McNeill & Libby CA-9 (1955) 221 F. 2d 225.

Associated Tel. Co. Ltd. vs. C. W. A. DC SD Cal (1953) 114 F. Supp. 334.

Castle & Cooke Terminals Ltd. vs. Local 137, I. L. W. U. DC Hawaii (1953) 110 F. Supp. 247.

Sound Lumber Mill Co. vs. Local Union DC ND Cal ND (1954) 122 F. Supp. 925.

I. L. W. U. vs. Sunset Line & Twine Co. DC ND Cal SD (1948) 77 F. Supp. 119.

APPENDIX A

Question No. 3

Cases in which Norris-LaGuardia Act is held to preclude granting injunctive relief under Sec. 301 of LMRA.

FIRST CIRCUIT

W. L. Mead, Inc. vs. I. B. T. Local Union No. 25 CA-1 (1954), 217 F. 2d 6.

Local 205 U. E. vs. General Electric Co. DC Mass (1955) 129 F. Supp. 665.

SECOND CIRCUIT

Alcoa S. S. Co. Inc. vs. McMahon CA-2 (1949) 173 F. 2d 567.

Local 937 vs. Royal Typewriter Co. DC Conn (1949) 88 F. Supp. 669.

THIRD CIRCUIT

Duris vs. Phelps Dodge Copper Products Corporation DC NJ (1949) 67 F. Supp. 229.

FOURTH CIRCUIT

Amazon Cotton Mill Co. vs. T. W. U. CA-4 (1948) 167 F. 2d 183.

Matson Navigation Co. vs. Seafarers International Union. DC Maryland (1951) 100 F. Supp. 730.

SEVENTH CIRCUIT

United Packing House Workers of America vs. Wilson & Co. ND Ill ED (1948) 80 F. Supp. 563.

EIGHTH CIRCUIT

Amalgamated Association vs. Dixie Motor Coach Corp. CA-8 (1948) 170 F. 2d 902.

NINTH CIRCUIT

California Assn. of Employers vs. Building and Construction Trades Council CA-9 (1949) 178 F. 2d 175.

Associated Tel. Co. Ltd. vs. C. W. A. DC SD Cal CD (1953) 114 F. Supp. 334.

Castle & Cooke Terminals Ltd. vs. Local 137, I. L. W. U. DC Hawaii (1953) 110 F. Supp. 247.

Sound Lumber Mill Co. vs. Local Union ND Cal ND (1954) 122 F. Supp. 925.

APPENDIX A

Question No. 3

Cases in which Norris-LaGuardia Act is held not to preclude granting injunctive relief under Sec. 301 of LMRA.

FIRST CIRCUIT

Local 205 U. E. vs. General Electric Co. CA-1 (4/25/56) 30 CCH LC Par. 69,908.

T. W. U. A. vs. American Thread Co. DC Mass (1953) 113 F. Supp. 137.

SECOND CIRCUIT

Wilson Bros. vs. T. W. U. A. DC SD NY (1954) 132 F. Supp. 163.

Local 207 vs. Landers, Frary & Clark DC Conn (1954) 119 F. Supp. 877.

THIRD CIRCUIT

Independent Petroleum Workers of N. J. vs. Esso Standard Oil Co. CA-3 (6/26/56), 30 CCH, LC Par. 70,064.

FIFTH CIRCUIT

Lincoln Mills vs. T. W. U. A. CA-5 (1956) 230 F. 2d 81.

SIXTH CIRCUIT

Milk & Ice Cream Drivers Union vs. Gillespie Milk Products Corp. CA-6 (1953) 203 F. 2d 650.

TENTH CIRCUIT

Mountain States Div. No. 17 C. W. A. vs. Mountain States Tel. & Tel. Co. DC Colo (1948) 81 F. Supp. 397.

DISTRICT OF COLUMBIA

The Evening Star Newspaper Co. vs. Columbia Typo. Union DC D of C (1954) 124 F. Supp. 322.

APPENDIX A

Question No. 4

Arbitration Act Not Applicable to Collective Bargaining Agreements.

FIRST CIRCUIT

Boston & Maine Trans. Co. vs. Amalgamated Assn. of Street and Electric Railway and Motor Coach Employees of America, Division No. 718, et al. 106 Fed. Supp. 334 (1952).

Newspaper Guild of Pawtucket vs. Times Publishing Co., 131 Fed. Supp. 499 (1955).

SECOND CIRCUIT

Shirley Herman Co., Inc. vs. International Hod Carriers Building and Common Laborers of America, Local Union No. 210, 182 Fed. 2nd, 806 (1950).

THIRD CIRCUIT

Amalgamated Assn. of Street Ry. and Motor Coach Employees of America, Local Div: 1210 vs. Penn. Greyhound Lines, Inc., 192 Fed. 2nd, 310 (1951).

Penn. Greyhound Lines, Inc. vs. Amalgamated Assn. etc. 193 Fed. 2nd, 327 (1952).

Ludlow Mfg. & Sales Co. vs. Textile Workers Union of America, CIO, 108 Fed. Supp. 45 (1952).

FOURTH CIRCUIT

United Electrical Radio & Machine Workers of America, et al vs. Miller Metal Products, Inc. 215 Fed. 2nd, 221 (1954).

FIFTH CIRCUIT

Lincoln Mills of Alabama vs. Textile Workers of America, CIO 230 Fed. 2nd, 81 (1956).

SIXTH CIRCUIT

Gatliff Coal Co. vs. Cox, 142 Fed. 2nd, 876 (1944).

EIGHTH CIRCUIT

W. R. Grimshaw Co. vs. Nazareth Literary & Benevolent Institution. 113 Fed. Supp. 564 (1953).

TENTH CIRCUIT

Mercury Oil Refining Co. vs. Oil Workers Intl. Union CIO, 187 Fed. 2nd, 980 (1951).

APPENDIX A

Question No. 4

Arbitration Act Applicable to
Collective Bargaining Agreements.

FIRST CIRCUIT

Goodall-Sanford, Inc. vs. U. T. W. A., Local 1802, CA-1 (1956) 30 CCH, LC Par. 69, 910.

Local 205 U. E. vs. General Electric Co. CA-1 (1956) 30 CCH, LC Par. 69,908.

Newspaper Guild of Boston vs. Boston Herald-Traveler Corporation CA-1 (1956) 30 CCH, LC Par. 69,909.

SECOND CIRCUIT

Signal-Stat Corporation vs. Local 475, U. E., Radio and Machine Workers of America (UE), CA-2 (7/2/56).

Lewittes & Sons et al vs. United Furniture Workers of America, CIO et al, 95 Fed. Supp. 851 (1951).

Wilson Brothers vs. Textile Workers Union, 132 Fed. Supp. 163 (1954).

Markel Electric Products, Inc. vs. United Electrical Radio & Machine Workers of America, V. E. 202, Fed. 2nd, 435 (1953).

THIRD CIRCUIT

United Office & Professional Workers of America, CIO vs. Monumental Life Insurance Co., 88 Fed. Supp. 602 (1950).

Harris Hub Bed & Spring vs. United Electrical Radio & Machine Workers of America, V. E. et al, 121 Fed. Supp. 40 (1954).

Tenney Engineering Co., Inc. vs. United Electrical Radio & Machine Workers of America, V. E. Local 437, 207 Fed. 2nd, 450 (1953).

SIXTH CIRCUIT

Hoover Motors Express Co., Inc. vs. Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, et al 217 Fed. 2nd, 49 (1954).

Arbitration Act Excluded or Not Considered Because of Sec. 301 of LMRA 1947.

FIRST CIRCUIT

Industrial Trades Union of America vs. Woonsocket Dyeing Co., Inc. 122 Fed. Supp. 872 (1954).

T. W. U. A. vs. American Thread Co. D.C. Mass. (1953) 113 F. Supp. 137.

SECOND CIRCUIT

Local 207 United Electrical Radio & Machine Workers of America vs. Landers & Frary & Clark, 119 Fed. Supp. 877 (1954).

D. C. CIRCUIT

The Evening Star Newspaper Co. vs. Columbia Typographical Union No. 101, 124 Fed. Supp. 322 (1954).

SIXTH CIRCUIT

International Union United Automobile Aircraft & Agriculture, et al vs. Buffalo-Springfield Roller Co., 131 Fed. Supp. 667 (1954).

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 4980.

LOCAL 205, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),

PLAINTIFF, APPELLANT,

v.

GENERAL ELECTRIC COMPANY,
(TELECHRON DEPARTMENT, ASHLAND, MASSACHUSETTS),

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES SUPREME COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

OPINION OF THE COURT.

April 25, 1956.

MAGRUDER, *Chief Judge*. This case, together with two others also decided today, presents the question of whether a federal district court has authority, under § 301 of the Labor Management Relations Act of 1947 (61 Stat. 156), to compel an employer to arbitrate a dispute in accordance with the terms of a collective bargaining agreement between such "employer and a labor organization representing employees in an industry affecting commerce."

Plaintiff-appellant is an unincorporated labor organization representing employees of defendant Company at a plant in Ashland, Mass., which is, without dispute, in an industry affecting commerce, within the meaning of the Act. Article XII of the collective bargaining agreement in effect between the parties at the relevant dates established a conventional four-step procedure for adjustment of employee grievances between the Union and the Company, by which negotiation was to continue at progressively higher levels if an agreement was not reached. Article XIII provided:

> "1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishing of wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company. . . . "

The Article required written notice of intention to submit an unresolved grievance to arbitration within 30 days after the decision rendered in step 4 of the grievance procedure, and it went on to describe certain procedural matters and restrictions on the scope of the arbitrator's authority. He was limited, in so far as relevant here, to "interpretation, application, or determining compliance with the provisions of this Agreement but he shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement."

Two grievances filed by the Union in 1954 are the subject of its present suit. One involved a dispute over whether an employee named Boiardi was employed in a certain job classification carrying a higher rate of pay than he in fact was receiving; the other involved the propriety of the discharge of an employee named Armstrong for refusing to clean certain machines when he asserted that such work

was in addition to his regular duties. After unsuccessfully prosecuting these matters through the procedure of Art. XII, the Union duly notified the Company in each case of its desire to arbitrate, but the Company refused to submit to arbitration either the merits of the two grievances or the disputed issue of whether they were arbitrable under the provisions of Art. XIII first quoted above. The Union then filed its complaint in the district court, alleging jurisdiction under § 301. It sought as to each of the grievance cases an order "that defendant be required specifically to perform its agreement to arbitrate" and damages. After the district court granted a motion to strike the claims for equitable relief, the amended complaint was again amended to eliminate the damage claims. This was done so that no question could be raised as to the appealability of the decision. Plaintiff's appeal is properly here, under 28 U.S.C. § 1291, from the final order of April 27, 1955, which dismissed the complaint for want of jurisdiction, the district judge being of the view that he was forbidden by the Norris-LaGuardia Act (47 Stat. 70) from issuing the requested order to compel arbitration of the two disputes. See 129 F. Supp. 665.

I.

In any case where equitable relief in some form is sought in the context of a controversy involving labor relations, a federal court must inquire whether the Norris-LaGuardia Act has withdrawn the jurisdiction of the district court to grant the desired remedy. See *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, 217 F.2d 6 (1954), in which case we affirmed an order denying a temporary injunction against a strike and picketing alleged to be in breach of a collective bargaining agreement. We held that § 301 had not repealed by implication the withdrawal of jurisdiction to enjoin the activities listed in § 4 of the Norris-LaGuardia Act even in a case where such activities constitute

a breach of contract. The present case presents a different problem, for the activity against which relief is sought, refusal to arbitrate, can in no way be fitted into any of the classes enumerated in § 4. However, consideration must also be given to § 7 of the Norris-LaGuardia Act, the relevant parts of which are set forth in the footnote.* See also §§ 8 and 9. If it is not implicit in our discussion in the *Mead* case, *supra,* we now affirm that our determination there that enactment of § 301 did not by implication repeal § 4 of the Norris-LaGuardia Act applies as well as to § 7 and indeed to the whole of that Act. It is in this light that one must read the dictum in the *Mead* opinion (217 F.2d at 9) that "equitable relief may sometimes be given in terms which do not trench upon the interdictions of § 4 of the Norris-LaGuardia Act." That is, any such equitable relief to be given in a suit brought under § 301 must also not "trench upon the interdictions of" § 7, when that section

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*"Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge hereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

and the Act of which it is a part are applicable according to their own terms.

In recognition of this situation, it has sometimes been argued that a suit to remedy a breach of contract does not involve or grow out of a "labor dispute." This argument cannot be accepted, in the face of the sweeping definitions of § 13, which set the scope of the Norris-LaGuardia Act. (47 Stat. 73) Any controvery between an employer and a union "concerning terms or conditions of employment" is included, "and no less so because the dispute is one that may be resolved or determined on its merits by reference to the terms of a collective bargaining agreement." *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, supra, 217 F.2d at 8, and cases cited; see Note, 37 Va. L. Rev. 739, 746 (1951).

Nevertheless, it is our conclusion that jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act. Althoug the present controversy is a "labor

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Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. . . ." (47 Stat. 71-72)

dispute" within the scope of the Act as defined in § 13, the relief sought is not the "temporary or permanent injunction" against whose issuance the formidable barriers of § 7 are raised. Of course, the label used to describe the judicial command is not controlling. We would not rest by saying that an order to arbitrate is a "decree for specific performance" in contradistinction to a "mandatory injunction;" for each term has been attached so frequently to this type of relief that neither can be rejected out of hand as an inappropriate characterization of it. But see 2 Pomeroy, Equitable Remedies § 2057 (2d ed. 1919). For reasons to be developed below, we believe that the "injunction" at which § 7 was aimed is the traditional "labor injunction," typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute. *E.g.*, *Alcoa Steamship Co., Inc.* v. *McMahon*, 81 F. Supp. 541 (S.D. N.Y. 1948), aff'd 173 F.2d 567 (C.A. 2d, 1949); *Associated Telephone Co., Ltd.* v. *Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953). An order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration, seems to have a different character, whatever name is given to it. Cf. *Sanford* v. *Boston Edison Co.*, 316 Mass. 631 (1944); *Lincoln Mills* v. *Textile Workers Union*, 230 F.2d 81 (C.A. 5th, 1956) (arbitration order denied on other grounds).

It should be noted in passing that the Supreme Court has recently reaffirmed its ruling that an order denying a stay of an action for damages in favor of arbitration is "refusal of an 'injunction' under" 28 U.S.C. § 1292. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180 (1955). Whether the same characterization would be applied to an order affirmatively compelling arbitration need not be decided, for the *Baltimore Contractors* case and its predeces-

sors were treating the stay order as an "injunction" only for the purpose of determining appealability under 28 U.S.C. § 1292(1), as is obvious from the opinions. What is an "injunction" for that statutory test would seem to have little relevance to what is an "injunction" in the wholly different context of the Norris-LaGuardia Act. Cf. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 452 (1935). See also *Goodall-Sanford, Inc.* v. *United Textile Workers*, No. 5029, decided today.

It is significant, while still at the verbal level, that within the Norris-LaGuardia Act itself a distinction is made in the breadth of the bars imposed on equitable relief. The sections that might be relevant here all deny jurisdiction to issue an "injunction" (§§ 4, 5, 7, 9, 10) or "injunctive relief" (§ 8). In contrast is § 3, where the so-called "yellow dog contract" is declared to be not enforceable in the federal courts by "the granting of legal or equitable relief." Congress might have more broadly withdrawn all "equitable relief" in § 7, and its use instead of the phrase "temporary or permanent injunction," in view of the clear desire for stringency in this Act, suggests that a narrower intent was deliberate.

More significant is the fact that the Norris-LaGuardia Act has been interpreted as not even withdrawing all "injunctive relief." *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949). Those cases might once have been explainable as resting upon special factors in the terms or history of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*), but the Supreme Court has quite recently extended the power to enjoin racial discrimination exercised in the *Graham* case to the case of a union subject to the National Labor Relations Act, apparently considering the possible differences between the two Acts as not worthy

of comment. *Syres* v. *Oil Workers Union*, 350 U.S. 892 (1955).

Basically, it is the language and background of the Norris-LaGuardia Act itself which point to the conclusion that the restrictions of § 7 do not have to be met as a prerequisite to jurisdiction to grant an order compelling arbitration. Section 7 requires certain preliminary allegations and findings: a threat of unlawful acts leading to substantial injury to property, greater injury to complainant in denying relief than to defendants in granting it, and the inability of the public officials charged with protection of property to furnish adequate protection. Procedural requirements include notice to said public officials and an undertaking for reimbursement by complainant and a surety. These provisions were obviously aimed to limit injunctions to cases involving violent or destructive acts. See also § 9. The enumerated requisites, which draw a logical line in relation to union conduct in strikes and picketing (and perhaps to some employer activities), are not at all compatible with the situation where one party merely demands that the other be compelled to arbitrate a grievance in accordance with a contract provision for arbitration, in which latter situation the required findings seldom, if ever, could be made either affirmatively or negatively. They just do not sensibly apply. We do not believe Congress intended § 7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts.

Congress had no hostility to arbitration as such, as is demonstrated by § 8 of the Norris-LaGuardia Act, which denies injunctive relief to any complainant "who has failed to make every reasonable effort to settle such dispute . . . with the aid of any available governmental machinery of mediation or voluntary arbitration." See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50

(1944). Indeed, the general purpose of the Act to encourage the development of free collective bargaining, while it should not be taken broadly as an argument for an interpretation excluding from the coverage of the Act all decrees for specific performance of contracts, may properly be invoked as additional support for our conclusion with respect to specific performance of the promise to arbitrate, as was done in *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163 (S.D. N.Y. 1954), appeal dismissed 224 F.2d 176 (C.A. 2d, 1955), and *Local 207* v. *Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954). See also *Virginian Ry. Co.* v. *System Federation No. 40*, supra, 300 U.S. at 563; Comment, 21 U. Chi. L. Rev. 251, 258-61 (1954).

Many of the cases dealing with demands for equitable enforcement of collective bargaining agreements have simplified the problem of the Norris-LaGuardia Act by use of what was deemed to be the appropriate label—"injunction," to deny relief, or "specific performance," to grant it—and they have tended not to distinguish between different types of equitable remedies in this regard. Therefore, we have not been persuaded by such cases denying relief as *Associated Telephone Co., Ltd.* v. *Communication Workers*, supra; *International Longshoremen's Union* v. *Libby, McNeill & Libby*, 114 F. Supp. 249, 115 F. Supp. 123 (D. Hawaii 1953), aff'd on other grounds 221 F.2d 225 (C.A. 9th, 1955). Nor does our conclusion rest on similar decisions granting relief, such as *Textile Workers Union* v. *Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950); *Milk Drivers Union* v. *Gillespie Milk Products Corp.*, 203 F.2d 650 (C.A. 6th, 1953).

Other cases, correct on their own facts, have often been cited, erroneously we think, as authority for denying equitable relief in all circumstances. *E.g., Alcoa Steamship Co., Inc.* v. *McMahon*, supra (§ 4 activity, as in the *Mead* case); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183 (C.A. 4th, 1948) (unfair labor practice). In addition,

there are cases which are frequently cited in support of the grant of an equitable remedy, although they seem only to have assumed that some equitable relief could be given, without mentioning the Norris-LaGuardia Act. See *AFL* v. *Western Union Telegraph Co.*, 179 F.2d 535 (C.A. 6th, 1950); *Textile Workers Union* v. *Arista Mills Co.*, 193 F.2d 529, 534 (C.A. 4th, 1951). Also silent on the effect of the Norris-LaGuardia Act were some of the cases dealing with the United States Arbitration Act (9 U.S.C. §§ 1 *et seq.*), which will be discussed below.

Thus we do not consider that our answer to the Norris-LaGuardia problem was either foreclosed or required by prior authority. It is supported directly by a few cases, one of which, although citing opinions on which we do not rely, aptly summed up the analysis made above: "The general structure, detailed provisions, declared purposes, and legislative history of that statute [Norris-LaGuardia Act] show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1933); cf. *Local 207* v. *Landers, Frary & Clark*, supra, 119 F. Supp. at 879; *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 165-66.

One final objection to our ruling should be discussed. It has been argued in these cases that no arbitration order could be given against a union under the Norris-LaGuardia Act, and therefore that the concept of mutuality of remedy requires that the same order against the employer be denied. The reply is two-fold. Our ruling herein, that an order to compel arbitration is neither barred specifically by § 4 nor subject to the requirements of § 7, means that such an order could be granted against either party to a labor dispute without violating the Act. The same is true

of an order to stay a lawsuit in favor of arbitration. If the union's breach of an arbitration promise should take the form of a strike, however, our prior holding in the *Mead* case applies, so that the order to arbitrate could not be accompanied by an injunction against the strike. Continuation of the strike theoretically is not a barrier to an arbitration, although practically it may be, in some cases, either because the employer deems it unfair to arbitrate in the face of a strike or because an arbitrator will not sit in those circumstances. See Cox, "Grievance Arbitration in the Federal Courts," 67 Harv. L. Rev. 591, 603-06 (1954). But the employer is not without remedies for such a continuing breach, even though the Norris-LaGuardia Act precludes the swift, effective injunctive remedy. See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, supra, 321 U.S. at 62-63; *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, C.A. 1st, March 6, 1956. In the second place, although the Norris-LaGuardia Act is not a "one-way street" (see S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932)), it certainly was intended and has application mainly as a protection for union and employee activities. Where its terms can be read to include employer conduct, that conduct should also be protected. See Wollett and Wellington, "Federalism and Breach of the Labor Agreement," 7 Stan. L. Rev. 445, 456 n. 59 (1955). But a realistic view of the way labor relations are carried on shows that there are few instances where this is the case. It would therefore be anomalous to read into the Act a requirement of exact mutuality of remedies, whatever force that concept may have in other contexts. Equitable relief against any party, if available under the holding of this opinion, must be molded, where necessary, to stay out of the "forbidden territory" delimited by the Norris-LaGuardia Act. Cf. *Fitzgerald* v. *Abramson*, 89 F. Supp. 504, 512 (S.D. N.Y. 1950).

II.

This case is not disposed of by holding that the Norris-LaGuardia Act does not negative the existence of jurisdiction, for the plaintiff cannot prevail in the end unless there is also an affirmative basis upon which to grant the remedy sought. In view of its disposition of the Norris-LaGuardia issue, the court below did not reach this question. Since it is purely a question of law, and was fully briefed and argued here, we proceed to resolve it in the first instance.

Preliminary to our task, however, is the choice of law problem: In this suit under § 301, do we look to federal or state sources to determine the availability of specific enforcement as remedy for breach of a promise to arbitrate? This is the problem largely left open by our second opinion in *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, decided March 6, 1956, wherein we held that § 301 was a constitutional exercise of the power of Congress to confer jurisdiction on the lower federal courts, regardless of the source of the law used to resolve certain issues determinative of the merits of a § 301 case. We did suggest certain specific points, by way of illustration, as to which federal law would certainly rule the controversy, even though Congress might perhaps have chosen to leave other matters to be determined by an application of state law—a point we found it unnecessary to determine.

Of course, if § 301 created a "generally applicable and uniform federal substantive right," as well as "a remedy . . . and . . . a forum in which to enforce it," as the enactment was described in *Shirley-Herman Co., Inc.* v. *International Hod Carriers Union*, 182 F.2d 806, 809 (C.A. 2d, 1950), then there would be no question that federal law is applicable to all issues, whether deemed substantive or procedural.

If, on the other hand, a federal court in a § 301 case may have to determine at least some substantive issues by refer-

ence to state law—which possibly is so—then the problem of choice of law governing the "forms and mode" of enforcing an arbitration agreement must necessarily be faced. Our answer in that event is in accord with the reasoning of Judge Wyzanski in *Textile Workers Union* v. *American Thread Co.*, supra, 113 F. Supp. at 141-42, relying on "the traditional rule that the availability of specific performance is a matter not of right, but of remedy, and that like other matters of remedy it is governed by the law of the forum. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109. . . ."

However, we must fit this conclusion into the analysis of arbitration enforcement recently made by the Supreme Court in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956). In that case, a damage action based on a written contract for the employment of an individual that included an arbitration clause, jurisdiction was founded solely on diversity of citizenship. One issue was the applicability of the doctrine of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), to the question of whether the lawsuit should be stayed in favor of arbitration. The Supreme Court held that "the remedy by arbitration . . . substantially affects the cause of action created by the State," 350 U.S. at 203, thereby invoking the test of *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-09 (1945), so that the question for that reason had to be decided accordinng to state law, as if the district court were "only another court of the State." In our opinion the ruling in the *Bernhardt* case has no bearing on a suit under § 301. As we explained in our second opinion in the *Mead* case, *supra*, decided March 6, 1956, jurisdiction in a § 301 case is not based upon diversity of citizenship. Rather, it is based upon that provision of Art. III of the Constitution which extends the judicial power of the United States to cases "in Law and Equity, arising under . . . the Laws of the United States. . . ."

Prior to the *Erie* decision, it was well accepted that the

means for enforcing an arbitration agreement properly fell in the category of remedy or procedure. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 123-25 (1924) (state statute); *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 277-79 (1943) (U. S. Arbitration Act). The *York* case, while recognizing that such questions normally are for the forum's own law, ruled that questions otherwise classified as questions of remedy and procedure must be determined in a diversity case according to state law when they may substantially affect the outcome of the case. That opinion and its progeny down to the *Bernhardt* case have emphasized the special demands of the diversity jurisdiction, as explained in the *Erie* and *York* opinions, as the basis for their rulings, and have given some indications of intent to limit to diversity cases their extensive reference to state "procedural" law. *E.g.*, see *Guaranty Trust Co.* v. *York*, supra, 326 U.S. at 101; *Bernhardt* v. *Polygraphic Co.*, supra, 350 U.S. at 202-03, 208. In other cases, considerations relevant to diversity suits have been held inapplicable where federal jurisdiction rested on other grounds, so that state procedural rules were not carried over even though the case involved some use of state law, *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), or was founded on a state cause of action for wrongful death adopted as part of the "general maritime law" enforceable in admiralty, *Levinson* v. *Deupree*, 345 U.S. 648 (1953). See *Doucette* v. *Vincent*, 194 F.2d 834, 842 n. 6 (C.A. 1st, 1952). Therefore we believe that in a § 301 case the *Erie*-*York* and *Bernhardt* decisions do not require us to apply state law concerning the "forms and mode" of enforcing an arbitration agreement.

This conclusion drawn from examination of the post-*Erie* cases is reenforced by recalling that the remedial powers of a federal court in a labor controversy are sharply restricted. The many limitations thrown up by provisions of Title 28, by the Norris-LaGuardia Act, and by § 301 itself must be

complied with in any event, as the first section of this opinion illustrates. Cf. *Guaranty Trust Co.* v. *York*, supra, 326 U.S. at 105. Reference in addition to state law for the availability and forms of specific enforcement would complicate and hamper the district court's observance of the limits Congress has imposed. That is especially true because the enforceability of arbitration agreements varies considerably among the states. Some grant no specific enforcement, others expressly deny it to collective bargaining contracts; many limit enforcement to agreements submitting an existing dispute, others enforce agreements to submit future disputes only if restricted to disputes that could be the subject of a lawsuit. Few states have provisions of effective scope for specific enforcement of labor arbitration promises. See Gregory and Orlikoff, "The Enforcement of Labor Arbitration Agreements," 17 U. Chi. L. Rev. 233, 240-42 (1950). In Massachusetts, it is not at all clear what is the present status of such enforcement. See Mass. G.L. (Ter. Ed.) C. 251, § 14, *Sanford* v. *Boston Edison Co.*, 316 Mass. 631, 636 (1944); Mass. G.L. (Ter. Ed.) C. 150, § 11, *Magliozzi* v. *Handschumacher & Co.*, 327 Mass. 569 (1951); Cox, "Legal Aspects of Labor Arbitration in New England," 8 Arb. J. (N.S.) 5, 9-13 (1953).

III.

This brings us to the availability and appropriateness, as a federal equitable remedy in a § 301 case, of a decree for specific performance of an agreement to arbitrate. In this connection, we do not forget the historic hostility of the judges, both at common law and in equity, to agreements for the submission of disputes to arbitration, and their manifested unwillingness to give such agreements full effect. Thus, while a valid award was enforceable at law or in equity, failure to satisfy all of the numerous formal or procedural rules would render an award invalid. Specific

performance of a submission to arbitration was granted if the submission had been made a rule of court or was limited to subsidiary issues in a lawsuit. But the specific enforcement of arbitration in general was barred by a pair of complementary rules that left nominal damages as the only remedy for breach of the promise to arbitrate: A submission was revocable by either party until the award was rendered; an agreement to submit future disputes to arbitration was invalid as an ouster of the jurisdiction of the courts. See Gregory and Orlikoff, *supra* at 235-38.

These rules were long embedded in the decisions of the federal, as well as state and English, courts. See *Red Cross Line* v. *Atlantic Fruit Co.*, supra, 264 U.S. at 120-23; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006 (S.D.N.Y. 1915). A generation or more ago Congress and many state legislatures were persuaded by the advocates of arbitration to reject this body of doctrine by enacting arbitration statutes. In perhaps only two states was the change accomplished by judicial overruling of the common-law restrictions on specific enforcement. See Gregory and Orlikoff, *supra* at 254. That history convinces us that the hoary though probably misguided judge-made reluctance to give full effect to arbitration agreements cannot now be ignored by us as a matter of federal law without a pretty explicit statutory basis for so doing. But cf. *Bernhardt* v. *Polygraphic Co.*, supra, 350 U.S. at 209-12 (concurring opinion).

Practical grounds support this conclusion. A glance at a typical arbitration statute shows that it lays down procedural specifications for use of the new power to compel arbitration. Topics covered may include requisites of a submission, selection of an arbitrator, procedure and subpoena power for the arbitrator, stay and specific enforcement authority in a court, grounds and procedure for confirming or vacating an award. A court decision could over-

rule the common law bars to specific enforcement, but could not substitute for them the comprehensive and consistent scheme that legislative action could afford, and which is necessary for effective yet safeguarded arbitration.

A number of courts have held that § 301 itself is a legislative authorization for decrees of specific performance of arbitration agreements. *E.g., Textile Workers Union* v. *American Thread Co.*, supra; *Wilson Bros.* v. *Textile Workers Union*, supra; *Local 207* v. *Landers, Frary & Clark*, supra; *The Evening Star Newspaper Co.* v. *Columbia Typographical Union*, 124 F. Supp. 322 (D.D.C. 1954); cf. *Milk Drivers Union* v. *Gillespie Milk Products Corp.*, supra. We think that is reading too much into the very general language of § 301. The terms and legislative history of § 301 sufficiently demonstrate, in our view, that it was not intended either to create any new remedies or to deny applicable existing remedies. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 46 (1947); H.R. Rep. No. 510 (Conference Report), 80th Cong., 1st Sess. 42 (1947); 93 Cong. Rec. 3734, 6540 (daily ed. 1947). Arbitration was scarcely mentioned at all in the legislative history. Furthermore, the same practical consideration that militates against judicial overruling of the common law doctrine applies against interpreting § 301 to give that effect. The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of an arbitration agreement. Lacking are the procedural specifications needed for administration of the power to compel arbitration. For example, in the *American Thread* case Judge Wyzanski deemed the U.S. Arbitration Act inapplicable, but no sooner had he ruled that § 301 authorized a decree for specific performance than he was faced with the need to adopt "as a guiding analogy" the procedure of § 5 of the U.S. Arbitration Act with respect to one such detail, the appointment of an arbitrator. 113 F. Supp. at 142. Thus it seems to us

that a firmer statutory basis than § 301 should be found to justify departure from the judicially formulated doctrines with reference to arbitration agreements.

IV.

The federal statute that does contain an integrated system for compelling arbitration is the United States Arbitration Act, first passed in 1925 (43 Stat. 883) and then codified and enacted into positive law as Title 9 of the U. S. Code in 1947 (61 Stat. 669), with one subsequent technical amendment (68 Stat. 1233).

The structure of the Act is as follows: Section 2, subject to definitions and an exclusion in § 1, provides that:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

If a suit is brought in a federal court, and the court "being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," § 3 requires that it "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," providing the applicant is not in default in proceeding with the arbitration. And specific performance, the remedy sought in the instant case, is authorized in § 4 in these terms:

> "A party agrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

That section goes on to detail the procedure for litigating defenses to such an order. Further details of procedure in court and before the arbitrator are given in §§ 6-8, 12-13. As already noted, § 5 provides a method for appointing an arbitrator where necessary. Finally, §§ 9-11 state the effect of an award and detail the grounds for confirming, vacating, modifying, or correcting an award.

The heart of the Act is contained in §§ 2, 3, 4. Although each of them states its scope in different terms, it has now been authoritatively held that § 2 defines the scope of § 3, on a basis that implicitly reaches § 4, as well. *Bernhardt* v. *Polygraphic Co.*, supra, 350 U.S. at 201-02. Thus the remedy of an original action for specific performance under § 4 is available only as to an arbitration agreement contained in the types of contracts defined by § 2 as qualified by § 1.

It is not usual terminology to refer to a labor contract as "evidencing a transaction involving commerce," but the *Bernhardt* opinion suggests that under proper circumstances an individual contract of hire would meet the test of § 2. For the Court ruled § 2 inapplicable to the situation of the particular employee involved in that case by saying (350 U.S. at 200-01):

> "Nor does this contract evidence 'a transaction involving commerce' within the meaning of § 2 of the Act. There is no showing that petitioner while performing

> his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."

If the employment contract there involved would have been subject to § 2 had such a showing been made, then a collective bargaining contract should *a fortiori* be held to be within the scope of § 2. Although it does not consummate the employment relationship, which may be the "transaction," the collective agreement sets the terms and conditions under which not one but hundreds or thousands of workers are employed, and thus "involves" commerce to a greater degree than any single hiring transaction could. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 1 U.S. 1 (1937); *J. I. Case Co.* v. *NLRB* 321 U.S. 332 (1944). We conclude that a collective bargaining agreement may be within the terms of § 2. See Sturges and Murphy, "Some Confusing Matters Relating to Arbitration under the United States Aribtration Act," 17 Law & Contemp. Prob. 580, 617-19 (1952); Cox, "Grievance Arbitration in the Federal Courts," supra, 67 Harv. L. Rev. at 598-99. Perhaps this is not so with respect to a collective bargaining agreement whose arbitration clause is not limited to controversies "arising out of such contract or transaction, or the refusal to perform the whole or any part thereof," as provided in § 2 of the Arbitration Act. See *Metal Polishers Union* v. *Rubin*, 85 F. Supp. 363 (E.D.Pa. 1949). We express no opinion on that question; the arbitration clause in suit is limited to "Any matter involving the application or interpretation of any provisions of this Agreement. . . ."

Section 2, however, must be read in connection with § 1, which, after defining "maritime transactions" and "commerce" in familiar terms, concludes with these enigmatic words:

"but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The *Bernhardt* case indicates clearly that this exclusion pertains to the entire Act. 350 U.S. at 201-02. We have then reached the ultimate major question of this appeal: Is a collective bargaining agreement a "contract of employment" within the meaning of § 1? We hold that it is not.

The term in question admittedly is not a "word of art" with a fixed technical definition, but it seems more familiar today as an equivalent to what once was called the "contract of hire," referring to an individual transaction, rather than as a generic term that would also embrace union-negotiated collective agreements. The distinction between the two concepts (and a suggestion of the difficulty of definition) appears in a well-known quotation from Mr. Justice Jackson's opinion for the Supreme Court in *J. I. Case Co.* v. *NLRB.*, supra, 321 U.S. at 334-35:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a *contract of employment* except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a *contract of employment.*" [Italics added.]

Compare the language used in § 3 of the Norris-LaGuardia Act to define a "yellow dog contract," which of course would not be a union contract: "Every undertaking . . . in any contract or agreement of hiring or employment between any [employer] . . . and any employee or prospective employee. . . ." (47 Stat. 70) But see *Amalgamated Assn.* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310, 313 (C.A. 3d, 1951), 65 Harv. L. Rev. 1239 (1952). See also Cox, "Grievance Arbitration in the Federal Courts," supra, 67 Harv. L. Rev. at 595-97.

If the words of § 1 do not have a "plain meaning," the legislative history does not conclusively make them plainer. The committee reports and hearings in the Congress which passed the Act contain only one reference—an ambiguous one—to the meaning of the exclusion. See Joint Hearings before Subcommittees of Committees on Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 21 (1924); S. Rep. 536 and H.R. Rep. 646, 68th Cong., 1st Sess. (1924). The whole tenor of these documents, however, demonstrates that congressional attention was being directed at that time solely toward the field of commercial arbitration. The history of the arbitration bill before the previous Congress and in the American Bar Association committee which had drafted it shows that the exclusion was inserted to overcome an objection by the Seamen's Union. But even this bit of history is ambiguous as to whether the objection was made with reference to union arbitration or individual arbitration of seamen's wage disputes. Compare *Tenney Engineering, Inc.* v. *United Electrical Workers*, 207 F.2d 450, 452 (C.A. 3d, 1953), with 65 Harv. L. Rev. 1240. When this basically weak type of legislative history is conceivably explainable on other grounds, such as objection to a new form of arbitration for seamen's individual contracts of hire (see 46 U.S.C. § 651), we cannot attribute much force to it against a reading of the statutory language itself.

Court decisions are divided on the breadth of the exclusion in § 1 of the U. S. Arbitration Act. Three circuits have held that it includes collective bargaining agreements. *Amalgamated Assn.* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (C.A. 3d, 1951); *United Electrical Workers.* v. *Miller Metal Products, Inc.*, 215 F.2d 221 (C.A. 4th, 1954); *Lincoln Mills* v. *Textile Workers Union*, 230 F.2d 81 (C.A. 5th, 1956). See also *Mercury Oil Refining Co.* v. *Oil Workers Union*, 187 F.2d 980, 983 (C.A. 10th, 1951); *Shirley-Herman Co., Inc.* v. *International Hod Carriers Union*, 182 F.2d 806, 809 (C.A. 2d, 1959). But cf. *Markel Electric Products, Inc.* v. *United Electrical Workers*, 202 F.2d 435 (C.A. 2d, 1953). Despite this position, the Third Circuit will apply the Act to most collective bargaining contracts, on its view that the exclusion only refers to collective agreements of transportation workers. *Tenney Engineering, Inc.* v. *United Electrical Workers*, 207 F.2d 450 (C.A. 3d, 1953).

On the other hand, the Sixth Circuit, while denying a stay under § 3 on other grounds, has squarely ruled that the exclusion covers only a "contract for the hiring of individuals," distinguishing its earlier cases apparently as being suits for wages upon contracts of hire incorporating the terms of a collective bargaining agreement. *Hoover Motor Express Co., Inc.* v. *Teamsters Union*, 217 F.2d 49, 52-53 (C.A. 6th, 1954). Accord, *Lewittes & Sons* v. *United Furniture Workers*, 95 F. Supp. 851 (S.D.N.Y. 1951); see *United Electrical Workers* v. *Oliver Corp.*, 205 F.2d 376, 385 (C.A. 8th, 1953); *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 165 (S.D.N.Y.); *Tenney Engineering, Inc.* v. *United Electrical Workers*, supra, 207 F.2d at 454-55 (concurring opinion). The question was expressly passed over in the *American Thread* case, *supra*, 113 F. Supp. at 139.

With the legislative history and judicial treatment in the condition just described, we feel free to consider the statu-

tory provisions as carrying its own full meaning in what it says. The term "contracts of employment" serves to define in part the scope of a statute which created a governing code for a newly important system of adjudicating controversies, and which has assumed permanent status by codification. It may well be that the attention of Congress was focused on the field of commercial arbitration in 1925, because the proposed legislation was being pressed by advocates of commercial arbitration. Nevertheless, in enacting the Arbitration Act, Congress chose not to use apt language to confine the application of the Act to the field of commercial arbitration. If it be assumed that only in the period subsequent to 1925 did arbitration under collective bargaining agreements emerge as a factor of major importance, the most that could be inferred from that would be that Congress did not specifically advert to arbitration under collective bargaining agreements. But such inference would not be enough to warrant an interpretation excluding collective bargaining agreements from the coverage of the Arbitration Act. It would be necessary to go further and to conclude that, had Congress in 1925 foreseen the developing importance of arbitration under collective bargaining agreements, it "would have so varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico* v. *The Shell Co.*, 302 U.S. 253, 257 (1937). There is no reason to suppose that this would have been so. Therefore, we hold that the exclusion in § 1 does not embrace collective bargaining agreements, as distinguished from individual "contracts of employment," and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act.

Some of those limitations have already been noted. Another which must be discussed is the provision of § 4 which authorizes specific enforcement of an agreement to arbitrate by a district court, "which, *save for such agreement*, would

have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties. . . . . " [Italics added.] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955), has sharply curtailed the subject-matter jurisdiction of federal courts under § 301 to adjudicate directly between union and employer a controversy over "terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." One court has already held that if the district court is barred by the *Westinghouse* decision from granting pecuniary relief on a wage controversy, it also lacks jurisdiction, by the terms of § 4, to compel arbitration of that dispute. *Textile Workers Union* v. *Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). However, the effect of the *Westinghouse* holding, reflected in all the opinions of the majority justices, was to eliminate from § 301 jurisdiction a complaint by a union that involves no more than a cause of action which is "peculiar in the individual benefit" or "the uniquely personal right of an employee" or which "arises from the individual contract between the employer and employee." 348 U.S. at 460, 461, 464. That holding was not aimed at any cause of action or remedy that appropriately pertains to the union as an entity, particularly one which an individual employee may have no equal power to enforce. The promise of the employer to arbitrate, which frequently is linked in the contract or in negotiations with a union no-strike pledge, seems to us to be at the forefront of the contract terms for whose breach only the union can effectively seek redress, and for whose breach § 301 should therefore still be an appropriate source of jurisdiction. Indeed, the history of litigation under § 301 shows that if cases seeking to compel an employer to arbitrate were throw into the discard along with

Westinghouse-type cases and those barred for trenching on exclusive NLRB jurisdiction, there would be no significant use a union could make of § 301. Its terms and legislative history demonstrate that, as we have earlier said of the Norris-LaGuardia Act, it was not intended to be strictly a "one-way street." The *Westinghouse* opinions show no intent to create any such result. It seems to us therefore that that decision is to be interpreted as denying jurisdiction over a controversy only where the union is seeking a remedy, usually a judgment for damages, which the individual employee equally could enforce in a suit on his personal cause of action. On that analysis, "Jurisdiction . . . of the subject matter of a suit arising out of the controversy" will exist so long as the union is not asking for the relief available to the individual employee, and thus the test of § 4 will be satisfied by a complaint which meets the terms of § 301 itself. Cf. *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 166.

V.

The case will therefore be remanded for further proceedings under the Arbitration Act. Since our decision makes clear for the first time in this circuit that that Act is applicable, the district court should now permit the parties to amend their pleadings so as to allege, respectively, compliance with the requisites of the Act and defenses afforded by it.

We have not passed upon the question of the arbitrability of the two grievances at issue here, although counsel for defendant informed us that the Company denies that they are arbitrable under the contract. Arbitrability is a question which the district court must pass on in the first instance. By way of guidance, it may be appropriate to note here a brief comment on some general principles. The scope of an arbitration pledge is solely for the parties to

set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation. See, *e.g., International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co., Inc.*, 168 F.2d 33 (C.A. 4th, 1948); *Markel Electric Products, Inc.* v. *United Electrical Workers*, supra (majority and dissenting opinions). However, an arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable therein and whether the applicant has satisfied the contract procedures prerequisite to arbitration. See, *e.g., Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 164-65; *Insurance Agents' Union* v. *Prudential Ins. Co.*, 122 F. Supp. 869, 872 (E.D.Pa. 1954). Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter, the court must decide such points before it can give relief under §§ 3 or 4 of the Arbitration Act. If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§ 10-11 of the Act. See, *e.g., Local 379* v. *Jacobs Mfg. Co.*, 120 F. Supp. 228 (D.Conn. 1953). See also *Goodall-Sanford, Inc.* v. *United Textile Workers*, No. 5029, decided today.

VI.

Plaintiff has submitted a motion to this court, under 28 U.S.C. § 1653, to amend its complaint so as to allege diversity of citizenship between all the members of the Union

and defendant, no doubt as a hedge against a ruling that relief could not be granted under the law applicable to a federal question case. In view of our decision, this motion may have become moot, but it must in any event be denied, for it cannot accomplish the result intended. Rule 17(b) F.R.C.P.; *Donahue* v. *Kenney*, 327 Mass. 409 (1951); *Worthington Pump & Machinery Corp.* v. *Local 259*, 63 F. Supp. 411, 413 (D. Mass. 1945).

The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 5029.

GOODALL-SANFORD, INC.,
DEFENDANT, APPELLANT,

v.

UNITED TEXTILE WORKERS OF AMERICA, AFL, LOCAL 1802 ET AL.,
PLAINTIFFS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE.
[129 F. Supp. 859; 131 F. Supp. 767]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

William B. Mahoney, with whom *Daniel T. Drummond, Jr.*, *Douglas M. Orr*, and *Drummond & Drummond* were on brief, for appellant.

Sidney W. Wernick, with whom *Berman, Berman & Wernick* was on brief, for appellees.

OPINION OF THE COURT.
April 25, 1956.

MAGRUDER, *Chief Judge*. This case is the third one decided today on problems relating to the power of a federal district court to compel arbitration in accordance with a collective bargaining agreement. However, the instant case reached this court in a posture different from that of the other two; and it involves additional considerations not present in *Local 205, United Electrical Workers* v. *General Electric Co.*, No. 4980,

or *Newspaper Guild* v. *Boston Herald-Traveler Corp.*, No. 4983.

Plaintiffs herein, a local labor organization and its parent national union, represented employees of defendant Company at plants in Sanford and Springvale, Maine, in an industry affecting commerce. The last collective bargaining agreement between the parties, as renewed in June, 1954, provided that it was to "continue in full force and effect" until July 15, 1955. The past tense is used advisedly, for defendant, because of continued heavy losses, commenced to terminate all operations at its Sanford and Springvale mills and inaugurated a program of liquidation during the second half of 1954. Production was limited to "running out" products in process, at the completion of which the several mills were shut down completely. By April, 1955, all production operations had ended and all of the real estate and buildings had been sold; the corporation was to go out of existence after liquidating completely.

On December 29, 1954, and February 18, 1955, certain groups of employees, (totaling approximately 1400) were notified that their respective employment with the Company was being terminated as of those dates and that their names were being removed from the payroll records. Although the workers were already on lay-off status, those actions were significant with respect to various "fringe benefits" provided in the collective bargaining agreement, including group life, medical, and hospitalization insurance, pensions, and vacation pay. The Union protested each of these notifications, achieving a month's delay as to the first group of terminations, and subsequently it requested arbitration of the entire problem in accordance with the contract, which will be described in some detail later in this opinion. The Company declined to

arbitrate, deeming the terminations not an arbitrable matter under the contract. On March 15, 1955, the Union filed its complaint in the present action, invoking § 301 of the Taft-Hartley Act (61 Stat. 156) as the basis for jurisdiction, and praying for an order to compel arbitration and for interlocutory injunctive relief. A restraining order and a preliminary injunction were granted, 129 F. Supp. 859, which forbade the termination, but on May 20, 1955, Judge Clifford dissolved the preliminary injunction. No questions touching upon the granting or dissolving of the injunction are presented on this appeal. In an opinion and order of June 1, 1955, 131 F. Supp. 767, the district court granted the Union's motion for summary judgment on its prayer for specific performance of the arbitration provision, and subsequently entered a decree which will be described later. The Company appeals from that decree.

I.

At the outset we must note a question as to whether the order and decree of the district court are appealable. The decree recites, as did the arbitration provision of the contract, that the decision of the arbitrator "shall be final and binding" on the parties. Thus it seems that the court did not intend to reserve jurisdiction to confirm the arbitrator's decision. Perhaps it could not have done so with respect to this contract calling for a "final and binding" award, since the Arbitration Act, 9 U.S.C. § 9, seems to authorize confirmation of an award by summary proceedings in the district court only when the contract includes an express stipulation for entry of judgment upon the award. See *Hyman v. Pottberg's Executors*, 101 F.2d 262, 266 (C.A. 2d, 1939); *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F.2d 1038 (C.A.D.C. 1932); S. Rep. No. 536, 68th Cong., 1st Sess. 4 (1924). It must be recognized,

however, that even without a reservation of jurisdiction to confirm the eventual award, a decree ordering parties to arbitrate obviously does not purport to adjudicate the merits of the controversy or finally terminate it. And where arbitration is sought through the related procedure for stay of a pending action pursuant to § 3 of the Arbitration Act, an appeal prior to the arbitration is only available, under 28 U.S.C. § 1292(1), whether the stay is granted or denied, if the pending action was "legal" rather than "equitable" in character. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955). The appeal at that stage may be unavailable under the test of the *Baltimore Contractors* case even where a request for an affirmative order compelling the other party to arbitrate was joined with the request for a stay. *Wilson Bros.* v. *Textile Workers Union*, 224 F.2d 176 (C.A. 2d, 1955); *Turkish State Railways Administration* v. *Vulcan Iron Works*, 230 F.2d 108 (C.A. 3d, 1956); cf. *Schoenamsgruber* v. *Hamburg American Line*, 294 U. S. 454 (1935) (§ 8). Chief Judge Clark has suggested that where an order to compel arbitration is granted in an independent proceeding under § 4, the appeal likewise should be denied, not only to make availability of appeal more consistent with the practice under other sections of the Arbitration Act, but also because an appeal prior to the arbitration may be "disruptive and delaying." See *Stathatos* v. *Arnold Bernstein Steamship Corp.*, 202 F.2d 525, 527 (C.A. 2d, 1953). There is much force to this view, although we doubt that a completely consistent pattern of appeal could be achieved in view of the variant situations illustrated by the cases already cited. At any rate, we are more persuaded by some of the older precedents, which viewed a § 4 proceeding as completed upon the granting of the only relief sought, an order of the court compelling arbitration, and thus held that order to be "final" in the sense of 28 U.S.C. § 1291.

Krauss Bros. Lumber Co. v. *Louis Bossert & Sons, Inc.*, 62 F.2d 1004 (C.A. 2d, 1933); *Continental Grain Co.* v. *Dant & Russell, Inc.*, 118 F.2d 967 (C.A. 9th, 1941). This holding, which we adopt here, contributes consistency at least to the extent that appeal is equally available whether the court grants or denies an order to arbitrate, for dismissal of a § 4 petition on the merits is clearly a final judgment.

II.

The district court did not proceed under the Arbitration Act (9 U.S.C. §§ 1 *et seq.*) in this case, but found its authority to compel arbitration in § 301, relying upon some of the decisions discussed in our opinion today in *Local 205* v. *General Electric Co.*, No. 4980. For the reasons stated in the latter opinion, we do not accept this approach. But our holding in the *General Electric* case applies here; if the terms of the Arbitration Act are satisfied, the decision to compel arbitration was within the power of the district court.

It would be merely dilatory at this stage to remand this case for amendment of pleadings to allege compliance and defenses under the Arbitration Act. In the other two cases decided today, wherein the district court had denied an order to arbitrate, remand for a decision on the merits was necessary, and so affording an opportunity to amend was appropriate. Here the district court has ruled on the merits, and we may proceed to review that decision, after determining from the record that the case substantially complies with the requisites of the Arbitration Act.

The arbitration clause at issue comes within the scope of § 2 of that Act. Article VIII of the contract provides that

> "any dispute which relates solely to the meaning and application of this Agreement or any individual grievance

> may be referred to arbitration by written notice by either party to the other. . . . Arbitration shall be in accordance with the following procedure: . . .
>
> 2. The Arbitrator shall have no power to add to or to subtract from the terms of this Agreement. . . ."

The four-step grievance procedure that precedes arbitration in Art. VIII was not carried out here, although conferences somewhat equivalent to step 4 took place. At any rate, the Company may be taken to have waived compliance with that procedure by its failure to allege that ground in resisting arbitration in the court below. The proceedings in that court in substance were equivalent to the procedure of § 4 of the Act. There was no issue over "the making of the agreement for arbitration or the failure to comply therewith," other than the question of arbitrability of the dispute. This the court determined upon motion for summary judgment. Since there was no controverted issue of material fact and the question of arbitrability turned only upon interpretation of the written contract, summary judgment was an appropriate vehicle for the decision, not inconsistent with the provision of § 4 for trial to a jury or the court of controverted issues regarding the making or breach of the agreement to arbitrate. See also part IV of our opinion in the *General Electric* case.

The decree ordered the parties to agree upon a person to serve as arbitrator but provided for selection of an arbitrator by the court if the parties failed to agree upon one within ten days. The order to select an arbitrator was consistent with Art. VIII of the contract, and the power of the court to make the appointment in the event the parties failed to do so is expressly conferred by § 5 of the Arbitration Act. The decree also provided, as already noted, that the award was

to be "final and binding," and it framed the questions to be submitted to arbitration as follows:

> "*a.* Did Goodall-Sanford, Inc. violate the collective bargaining agreement . . . [by taking the action described at the beginning of our opinion] . . . ;
>
> *b.* If a violation of contract was committed by Goodall-Sanford, Inc. what must be done by Goodall-Sanford, Inc. appropriately and fully to remedy the said wrong to the employees affected, in accordance with the terms and provisions of the entire collective bargaining agreement."

This formulation of the issues in dispute is accurate and serves to limit the arbitrator to the matters deemed arbitrable by the court, a limitation of which defendant cannot complain. Defendant has argued here that the second question, taken with the provision for finality, is somehow improper. We do not understand this. Arbitrators conventionally award appropriate relief, upon finding a breach of contract; there would be little point to arbitration otherwise, and the parties must have understood that in placing an arbitration clause in their collective bargaining agreement. The contract itself provides for finality of an award, so that provision of the decree has no particular effect. Of course, despite "finality" an award is subject to some degree of judicial review through 9 U.S.C. §§ 10-11 or other appropriate proceedings. See *Hyman* v. *Pottberg's Executors*, supra, 101 F.2d at 266.

In summation, we find no jurisdictional or procedural error in the action of the district court, nor any substantial deviation from the procedure that would have been followed under the Arbitration Act. Accordingly, we turn to the merits of the decision below.

III.

The "merits" of a suit to compel arbitration, of course, do not include the ultimate issues of contract interpretation that determine the outcome of the controversy. Those are what the arbitrator will decide. What we must pass on here is only the district court's determination that the controversy is arbitrable. The court held "that the dispute relates to the 'meaning and application' of the agreement and that the contentions of the parties in this respect are not frivolous but are fairly and justly maintained and advanced." 131 F. Supp. at 771. It will be helpful now to set forth the relevant provisions of the contract. The arbitration paragraph itself was quoted in the last part of this opinion and so will not be repeated. It will also be recalled that the collective bargaining agreement had been extended in June, 1954, to "continue in full force and effect" until July 15, 1955.

Article VII, entitled "Termination of Employment," stated as follows:

> "A. Reasons for Termination: An employee's continuous service and his employment with the Company shall be terminated by:
>
> 1. Voluntary Quit.
>
> 2. Discharge for cause.
>
> 3. Absence from work for a period of eighteen (18) months or more for any reasons other than to fill a Union position to which the employee was elected or appointed or where an entire operation has been discontinued."

Eligibility to be paid for the annual summer vacation was given in Art. V in these terms:

"B. Eligibility Requirements: During the term of this agreement an employee on the payroll of the Company on June 1st of the vacation year and who has worked at least 900 hours in the twelve-month period from June 1 of the preceding year to May 31 of the vacation year (both dates included) shall be eligible for vacation with pay. . . ."

Subsequent paragraphs provided for the computation of the amount of "vacation pay" on the basis of the average hourly earnings of employees in the last week or month preceding June 1 in which they worked, and for payment of a "vacation bonus," a percentage of wages for the year ending June 1, to employees who had been "in the continuous employment of the Company" for certain periods but who did not qualify for vacation pay under the foregoing provisions.

It will be seen that eligibility for vacation pay or vacation bonus was tied to existence of the employment status on a given date, June 1, regardless of whether the employee had worked continuously throughout the preceding year or was working on the date in question, with vacation pay as such limited to those who had worked at least 900 hours during the year (approximately 23 weeks on the normal workweek of Art. III). The district court found that eligibility for the other benefits described in the complaint—life, health, and accident insurance and pensions—also was related to the employment status, with partial benefits continuing during a lay-off but not if the employment was terminated. See 129 F. Supp. at 864-65. The preliminary injunction granted by the district court in that opinion seems to have afforded the principal relief pertinent to those benefits, and it appears that the vacation pay-vacation bonus issue is the major, if

not sole matter in the case at this time. The injunction was lifted on May 20, 1955, and counsel informed us at the argument that the Company carried out the termination of the employment of the persons involved before June 1. The Union's contentions are that this action (delayed since February by the injunction) violated the provisions of Art. VII as to how employment may be terminated, and that those provisions are exclusive. The Company argues to the contrary.

In addition, both the Union and the Company may find support in other articles of the contract, such as these:

"ARTICLE I

D. Rights of Management: The management of the Company's business, including . . . the direction of its working force and the right to hire, lay-off and suspend employees is vested exclusively in the Company, subject to the provisions of this agreement."

"ARTICLE XIII

. . . this Contract contains all matters on which the parties are mutually agreed. If at any time while this agreement is in effect the parties desire to modify, amend, or add to it in any respect either retroactively or prospectively they may do so by mutual assent. . . ."

"ARTICLE XVI

The parties acknowledge that during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties

after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Company and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to, or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this agreement."

It is not our function here to determine whether a reconciliation of all these contract provisions will support or refute the Union's conteptions. We believe that the provisions set forth at length above do indicate, as the district court held, that the facts of this case involve a "dispute which relates solely to the meaning and application" of the contract, in the words of the arbitration clause, and that the contentions of the party seeking arbitration thereunder are not frivolous or baseless.

However, defendant argues that well-settled law entitles an employer to shut down an unprofitable business and terminate the employment of its employees, so that the termination of employment under those circumstances cannot create an arbitrable issue under a collective bargaining agreement. The point is well stated in defendant's brief in these words:

"A collective bargaining agreement is a living thing to govern the relationship of the parties during the life of the agreement while the business is being operated as

> a going business. It certainly does not bind the employer to carry on an unprofitable business. The decision to completely and finally discontinue an unprofitable business is a function of management and the collective bargaining agreement was not designed to limit that function."

It may be that existence of a collective agreement with a union for a fixed term does not affect the common law status of the individual employments as contracts terminable at will, except in so far as the union contract expressly limits the employer's power to terminate. See *United States Steel Corp. v. Nichols*, 229 F.2d 396 (C.A. 6th, 1956); 1 Teller, Labor Disputes and Collective Bargaining § 169 (1940). And it may also be that, as a result, the act of terminating employment because a department or an entire business is closed cannot be prevented, or made the basis for liability to a lawsuit or to arbitration under a "discharge for cause" provision of a union contract. See *Local Union No. 690 v. Ford Motor Co.*, 113 F. Supp. 834 (E.D.Mich. 1953); *Machine Printers Beneficial Assn. v. Merrill Textile Print Works, Inc.*, 12 N.J. Super. 26, 78 A.2d 834 (App.Div. 1951); *Industrial Trades Union v. Woonsocket Dyeing Co., Inc.*, 122 F. Supp. 872 (D.R.I. 1954). We do not have to make a decision on either of those propositions, for the situation before us is distinguishable.

It cannot be doubted that a collective bargaining agreement could be drawn to cover the problems arising in the eventuality of an employer's going out of business. For example, see the collective bargaining agreement dealt with in *Byerly v. Duke Power Co.*, 217 F.2d 803 (C.A. 4th, 1954). Even without an express reference to that possibility in the contract, in view of the increasingly complex use of compensation in the

form of "fringe benefits," some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern. See *Matter of Potoker*, 286 App.Div. 733, 146 N.Y.S.2d 616 (1st Dept. 1955). Here the eligibility for vacation pay was stated in Art. V to be dependent on existence of the employment relationship on a given date, prior to the end of the contract term. The parties must have contemplated that on this date particular employees might have been away from work for a considerable time subsequent to completion of the minimum 900 hours of work whereby they had earned the vacation pay. Without deciding whether this contract term does have continued effect in the circumstance of the employer's good faith decision to terminate all operations prior to June 1, 1955, we hold that the question thus posed is an arbitrable one under this contract on the facts of this case. Cf. *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (S.D.N.Y. 1954), appeal dismissed 224 F.2d 176 (C.A.2d, 1955); *Matter of Potoker*, supra.

The decree of the District Court is affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 262

GOODALL-SANFORD, INC.
DEFENDANT-APPELLANT, *Petitioner*

vs.

UNITED TEXTILE WORKERS OF AMERICA, A. F. L. LOCAL 1802, AND UNITED TEXTILE WORKERS OF AMERICA, A. F. L.
PLAINTIFFS-APPELLEES, *Respondents*

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BRIEF FOR DEFENDANT-APPELLANT, PETITIONER

OPINIONS BELOW

The opinion of the District Court is reported in 131 Fed. Supp. 767 and is set forth in full R. 39-49, inc. The opinion of the Court of Appeals is reported in 233 F. 2d 104 and is printed in full, R. 57-69.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. Par. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States jurisdiction where no other ground for Federal jurisdiction is alleged or claimed.

2. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States equitable jurisdiction to grant injunctions or compel specific performance of arbitration clauses in a collective bargaining agreement.

3. Whether the District Court has jurisdiction to decree specific performance of an agreement to arbitrate such a dispute, despite the prohibitions of the Norris-LaGuardia Act.

4. Whether the United States Arbitration Act, 9 U.S.C. Sec. 1 et seq. is applicable to an agreement to arbitrate in a collective bargaining agreement.

5. Whether a union may prosecute, by way of arbitration procedure in a collective bargaining agreement, the peculiarly personal rights of individual employees to recover vacation pay, and judicially compel arbitration for that purpose.

6. The appealability of an order granting specific performance of an arbitration covenant.

STATUTES INVOLVED

The Statutes involved are the United States Arbitration Act, 61 Stat. 669; Sec. 1 et seq. (1947) as amended September 3, 1954, 68 Stat. 1233, 9 U.S.C. Sec. 1 et seq., the Labor Management Relations Act, 61 Stat. 136 (1947) 29 U.S.C.

141 et seq. and the Norris-LaGuardia Act, 47 Stat. 70 (1932) 29 U.S.C. 101, et seq. Judicial Code 28 U.S.C.A. Sec. 1291, 1292. These statutes are set forth more fully in Appendix A.

STATEMENT OF THE CASE

The statement of the case, as presented in the District Court, is printed R. 39-46, inc. and as presented to the Court of Appeals is printed R. 58-59, inc.

The case involves a petition by a labor organization to the United States District Court for the District of Maine, Southern Division, to compel specific performance of the arbitration provisions of a collective bargaining agreement between United Textile Workers of America, A. F. L. local 1802, and United Textile Workers of America, A. F. L. Plaintiffs, and Goodall-Sanford, Inc., Defendant.

The dispute arose when the Union protested the action of the Company in terminating employment of employees then on lay-off status when, because of heavy losses, the defendant corporation had decided to terminate all operations and had inaugurated a program of complete liquidation of the mill properties.

The defendant refused the demand of the Union for arbitration of the dispute on the ground that the discontinuance of operations for business reasons and the termination of employment incident thereto was a prerogative of management and the dispute was, therefore, not arbitrable under the collective bargaining agreement.

Termination of all production operation of the mills and the sale of all real estate and buildings had been completed by April 5, 1955, approximately two months prior to the date of decision in the District Court.

The pertinent articles of the collective bargaining agreement are, by stipulation, set forth in full in Exhibit A (R. 25-31, inc.) and pertinent provisions thereof are quoted in the opinion and order of the District Court of June 1, 1955, R. 41-43 and, in the opinion of the Court of Appeals, R. 61 and 62, 64 and 66.

The only ground for jurisdiction of the District Court alleged in the original and amended complaint is Section 301 of Title III of the Labor-Management Relations Act of 1947, 29 U.S.C. Sec. 185.

The District Court denied defendant's motion to dismiss the amended complaint, R. 4 and, on June 1, 1955, denied the defendant's motion to dismiss the complaint, as further amended, R. 5. On June 1, 1955 the District Court entered an opinion and order, granting Plaintiffs' motion for summary judgment R. 39-49 and, on June 13, 1955, entered a decree directing arbitration of the dispute R. 49-51. An appeal to the Court of Appeals for the First Circuit was seasonably perfected by the Defendant from the denial of the Defendant's motion to dismiss and the granting of the Plaintiffs' motion for summary judgment and the decree thereon. R. 51.

No claim was made in the Plaintiffs' original or amended pleadings in the District Court that the Plaintiffs were demanding the relief of specific performance under the United States Arbitration Act, and no allegation or proof of compliance by the Plaintiffs with the requirements of said Act was made. The decision of the District Court was bottomed squarely on its interpretation of the provisions of Section 301, Labor-Management Relations Act, as granting to that Court jurisdiction to grant the relief of specific performance of the arbitration provisions of the collective bargaining agreement.

At no time, in the District Court or in the Court of Appeals, either in the written briefs or in oral argument, was any claim made by the Plaintiffs that relief was sought under the United States Arbitration Act, or that the provisions of that Act had been complied with by the Plaintiffs.

The Court of Appeals disagreed with the District Court as to its authority to compel arbitration under Sec. 301 (R. 61) alone and held (a) that the United States Arbitration Act applied to the controversy (b) that the Defendant had waived compliance by the Plaintiffs with the requirements of the Arbitration Act. (R. 62), (c) that as there was no controverted issue of material fact, summary judgment was the appropriate vehicle for decision (R. 62) and (d) that an arbitrable issue was presented on the facts in the case (R. 69). On April 25, 1956 the Court of Appeals rendered its opinion, affirming the decree of the District Court (R. 57-69) and, on the same day, entered judgment (R. 71) and, on May 9, 1956, stayed the mandate until further order of Court (R. 71).

On October 8, 1956, this Court granted certiorari limited to Questions numbered 1-5, as hereinbefore enumerated, and to the question raised by the respondents, namely, the appealability of an order granting specific performance of an arbitration covenant, hereinbefore numbered Question 6, (R. 71-72). This Question 6 was not raised in the Court of Appeals.

SUMMARY OF ARGUMENT

As jurisdiction is claimed solely under Section 301 of the Labor-Management Relations Act of 1947 and there is no diversity of citizenship, the constitutional grant of jurisdiction must find support under the federal question provision

of Section 2 of Article III of the Constitution. It cannot be justified under Article I.

Assuming a constitutional grant of jurisdiction under Section 301, the grant should not be construed as a direction to the Federal Courts to fashion a Federal common law of its own, applicable to collective bargaining agreements, but at most as a direction to apply state law, and the substantive law of Maine does not permit specific enforcement of agreements for final and binding arbitration of future disputes.

Section 301 should be construed as granting to the District Courts authority to entertain actions for money damages only and in no event should it be construed as authorizing an injunction or suit for specific performance.

Section 301 did not, pro tanto, repeal the prohibitions of the Norris-LaGuardia Act against the granting of injunctions by the District Courts in cases involving or growing out of a labor dispute and the plain and unambiguous interdictions of Section 7 leave no room for any interpretation other than the plain meaning of the words used.

An action under Section 4 of the Arbitration Act is not maintainable because:

(a) The jurisdictional requirement of Title 28 is not met.

(b) The legislative history compels the conclusion that the Arbitration Act is not applicable to labor disputes at all.

(c) Collective bargaining agreements were intended to be excluded by the language of the exclusionary clause in Section 1.

Section 301 having already been construed as not granting to the Union authority to enforce the individual rights of an employee to recover for services performed, it should

not now be construed as permitting the Union to accomplish the same result by a judicially enforced arbitration.

The order granting specific performance of the arbitration clauses of the collective bargaining agreement in this case was appealable.

ARGUMENT

QUESTION NO. 1

WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 GRANTED TO THE DISTRICT COURTS OF THE UNITED STATES JURISDICTION WHERE NO OTHER GROUND FOR FEDERAL JURISDICTION IS ALLEGED OR CLAIMED.

Even if Section 301 is held to be, though a mere procedural direction, a constitutional grant of jurisdiction to federal courts over a contract governed by state law, Maine law does not permit specific enforcement of agreements requiring the submission of future disputes to final and binding arbitration.

Justice Frankfurter in his opinion in *Association* v. *Westinghouse Electric Company*, 348 U.S. 437, 99 L. ed. 510 concludes that nothing in the Taft-Hartley Act suggests the general application of federal substantive law in actions arising under Section 301 and that Section 301 is a mere procedural provision. Since Section 301 expressly eliminates the requirement of diversity of citizenship a question arises as to whether Section 301 satisfies the requirements of the so-called federal question clause of Section 2 of Article III of the Constitution, which provides that the judicial power shall extend to all cases arising under the laws of the United States. Some of the lower courts have tried to circumvent the lack of a body of federal substantive law with

respect to collective bargaining agreements by holding that Section 301 itself is a direction to develop a federal common law in connection with the rights of the parties. See e. g. *Shirley-Herman Co.* v. *Local No. 210*, 2 Cir. 1950, 182 F. 2d 806, 17 A.L.R. 2d 609. Justice Frankfurter's opinion in the Westinghouse case at 348 U.S. 437, 452; 99 L. ed. 510, 521 disposes of this argument by setting forth some of the difficult problems of choice in matters of "delicate legislative policy" which would be required if Section 301 were construed as such a direction.

If, then, Section 301 is to be held constitutional, analogies would have to be found to two other lines of decisions where jurisdictional grants were upheld despite the fact that state substantive law was controlling and diversity jurisdiction did not exist.

The first line began with *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824) in which the Supreme Court upheld a grant of federal jurisdiction over all suits to which the bank was a party including suits which did not involve the interpretation of the statute creating the bank and which were governed by state commercial law. The court found what it called the "ingredient" necessary for federal jurisdiction in the Federal Charter creating the Bank which is a law of the United States.

The second line of decisions is concerned with that part of the Bankruptcy Act which provides that, in specific circumstances, plenary suits by a trustee in bankruptcy to recover on rights of action which were originally the bankrupt's may be brought in a district court (and not necessarily the one in which the bankruptcy proceedings are pending) and even though the cause of action sued upon is generally a creation of state law. *Schumacher* v. *Beeler*, 293 U.S. 367, 79 L. ed. 433.

The federal ingredient in the bankruptcy cases is the passing of the entire title of the bankrupt to all his non-exempt property and rights of action, by operation of federal law, from the bankrupt to the trustee. See Judge Denison's opinion at page 641 in *Toledo Fence & Post Co.* v. *Lyons*, 6 Cir. 1923, 290 F. 637.

In these two lines of decisions, therefore, the federal ingredient which satisfies the federal question clause of Article III, despite the absence of any body of federal substantive law, is clear. Without the federal charter creating it, the Bank would have no standing to sue in any court, federal or state. Without the vesting in the trustee of the bankrupt's title under the Bankruptcy Act, the trustee would have no standing to sue in any court, federal or state. In either case the suit is brought by one who owes his existence to a federal law.

No such a federal ingredient exists in the federal labor relations laws. Employers and labor organizations can sue each other on their contracts in both federal and state courts provided the necessary jurisdictional and procedural requirements are met and their right to sue does not depend upon any federal law. They have standing to sue without any federal law; they do not owe their existence to a federal law.

In fact, the contract in this case was made in Maine between a labor organization operating in Maine and a Maine corporation as the employer and there is nothing whatever about the contract which brings the federal law into predominance.

A majority of the Supreme Court in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 93 L. ed. 1556, has specifically rejected the theory that Con-

gress has the power, by reason of its legislative powers under Article I, without reference to Article III, to grant jurisdiction to the federal courts. Article I legislative powers are not, therefore, enough to satisfy the requirements for federal question jurisdiction; it seems doubtful that a mere exercise of these Article I legislative powers, without the creation of the necessary federal ingredient, is sufficient to satisfy such requirements, however much Congress may want to protect its legislation in the area.

Assuming that Section 301 is a constitutional grant to the federal courts, the question is whether we look to federal or state sources to determine the availability of specific enforcement as a remedy for breach of a promise to arbitrate.

In *Bernhardt* v. *Polygraphic Co.*, 100 L. ed. 199; 350 U.S. 198 (1956) this Court set forth at 100 L. ed. 203, 205; 350 U.S. 198, 203 that the remedy by arbitration substantially affects the cause of action created by the state and so the state law, not the law of the forum, applies. Arbitrators don't have the benefit of judicial instruction on the law; they need not give reasons for their decisions; the record is not so complete as it is in a court trial; judicial review of an award is more limited than judicial review of a trial; in other words, the use of arbitration procedure for the settlement of a dispute may well affect the substantive rights of the parties.

There is no valid distinction, as was attempted to be made by the Court in *Local 205, U.E.* v. *General Electric Co.*, 1 Cir. 1956, 233 F. 2d 85, 95, between the case at bar and the *Bernhardt* case on the ground that the latter was a diversity case subject to the rule of *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). As pointed out above, this was a contract made in Maine between a labor organization operating in Maine and a Maine corporation as the employer and if any federal law is at all involved, it is not in the forefront; there is, therefore, more reason to apply Maine substantive law to this contract than in an ordinary diversity case.

Assuming then that Section 301 is a constitutional grant to the District Courts to apply state substantive law to collective bargaining agreements in industries affecting commerce, Maine law does not permit specific enforcement of agreements requiring the submission of future disputes to final and binding arbitration.

A provision in a contract for final binding arbitration of a future dispute is not legally enforceable under the law of Maine. *Conant* vs. *Arsenault*, 119 Maine 411, 111 A. 578, *Dugan* vs. *Thomas*, 79 Maine 221, 9 A. 354.

Under the law of Maine, even the agreed submission to arbitration of an existing dispute is revocable by either party at any time before award. *Clark* vs. *Clark*, 111 Maine 416, 89 A. 454. *Brown* vs. *Leavitt*, 26 Maine 251. *Cumberland* vs. *North Yarmouth*, 4 Maine 462. *Lebel* vs. *Cyr*. 140 Maine 98, 34 A. 2d 201.

Lewiston Auburn Shoeworkers vs. *Federal Shoe Inc.*, 150 Maine 432, 114 A. 2d 248 (1955) does not aid the plaintiffs. That case simply holds that a party who had agreed to arbitrate an existing dispute cannot withdraw after full hearing and after a majority of the arbitrators have indicated their decision.

QUESTION NO. 2.

WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 GRANTED TO THE DISTRICT COURTS OF THE UNITED STATES EQUITABLE JURISDICTION TO GRANT INJUNCTIONS OR COMPEL SPECIFIC PERFORMANCE OF ARBITRATION CLAUSES IN A COLLECTIVE BARGAINING AGREEMENT.

The purpose of 301 was to impose a liability on a union for money damages for breach of a collective bargaining

agreement and to protect the union members from personal liability for a judgment for damages and to provide a vehicle by which the union could be sued for damages in a federal district court. This is borne out by Justice Frankfurter's statement in *Association* v. *Westinghouse Electric Company*, 348 U.S. 437, 443; 99 L. ed. 510, 515 and by Senator Taft's statement in 93 Cong. Rec. 3955 on April 23, 1947 which are both here quoted.

Justice Frankfurter—

> "If the section is given the meaning its language spontaneously yields, it would seem clear that all it does is to give procedural directions to the federal courts. "When an unincorporated association that happens to be a labor union appears before you as a litigant in a case involving breach of a collective agreement," Congress in effect told the district judges, "treat it as though it were a natural or corporate legal person and do so regardless of the amount in controversy and do not require diversity of citizenship." "

Senator Taft—

> "Mr. President, title III of the bill, on page 53, makes unions suable in the Federal courts for violation of contract. As a matter of law unions, of course, are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some states all the members must be served; it is difficult to know who is to be served. But the pending bill provides they can be sued as if they were corporations and if a judgment is found against the labor organization, even though it is an unincorporated association, the liability is on the labor union and the labor-union funds, and it is not on the individual members of the union where it has fallen in some famous cases to the great financial distress of the individual members of labor unions."

As set forth in Justice Frankfurter's analysis of the legislative history of Section 301 in *Association* v. *Westing-*

house Electric Co., 348 U.S. 437, 444; 99 L. ed. 510, 516, congressional concern with obstacles surrounding union litigation began to manifest itself as early as 1943. This concern eventually resulted in the independent introduction in the 80th Congress of Section 302 of H.R. 3020 and Section 301 of S 1126 each of which contained paragraphs which closely resemble Section 301, as finally passed, except Section 302(e) of H.R. 3020 which read as follows:

> "(e) In actions and proceedings involving violations of agreements between an employer and a labor organization or other representative of employees, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes", shall not have any application in respect of either party."

The two bills were referred to a joint committee and the present Section 301 represents that committee's compromise which was passed over a presidential veto.

At the time of the taking up in the Senate of the compromise Section 301 and of the joint committee report on the disagreeing votes of the two houses, Senator Taft presented a detailed analysis of the compromise bill which eventually passed and stated, at 93 Cong. Rec. 6443 (Bound), June 5, 1947:

> "When the bill passed the Senate it also contained a sixth paragraph in this subsection which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. The House conferees objected to this provision on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board, rather than by the courts. The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in

subsection 8(b)(5)w. . The provisions of the Senate amendment which conferred a right of action for *damages* upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (Section 301). If both provisions had remained, there would have been a probable conflict of remedies and decisions."

President Truman states, U. S. Code Congressional Service, 80th Congress, First Session, 1947, at page 1854:

"In introducing *damage* suits as a possible substitute for grievance machinery, the bill rejects entirely the informed wisdom of those experienced in labor relations."

Thus Senator Taft, one of the architects of the bill which bears his name, and President Truman, whose detailed treatment of the bill in his veto message indicated a careful study of it, both analyze Section 301 as being limited to suits for money damages.

Their respective analyses are borne out by both the legislative history and the act itself.

Beginning with the passage of the Norris-LaGuardia Act in March 1932, 47 Stat. 70, 29 U.S.C.A. Section 101 et seq., Congress instituted a policy of limiting the jurisdiction of the District Court in cases involving labor disputes. The purpose and effect of that legislation was to deprive the federal courts of jurisdiction to interfere by injunction with labor disputes except in a very limited class of cases. As set forth in *W. L. Mead, Inc.* v. *International Brotherhood, etc.* 1 Cir. 1954, 217 F. 2d 6, 9, it is an accepted canon of construction that repeals by implication are not favored especially if the earlier enactment is a significant piece of legislation.

That Congress was, at the time of the passing of Section 301 aware of this policy against judicial interference in

labor disputes, is clear from the many comments made in both the Senate and the House and from the express designations in the Act itself as to the specific circumstances under which Federal District Courts may issue injunctions in labor disputes. Sections 10(e), 10(j) and 10(l) of the Act authorize the Board or its agents to petition for restraining orders and injunctions; in Section 10(h) it was provided that, when granting appropriate temporary relief or a restraining order or making a decree enforcing an order of the Board, the jurisdiction of the courts sitting in equity should not be limited by the provisions of the Norris-LaGuardia Act. But this departure from Norris-LaGuardia is sanctioned only where the Board was seeking enforcement of its orders or an aggrieved party was seeking review of a court order. Section 208 authorizes the Attorney General to petition to enjoin strikes imperiling the national safety and Section 208 expressly makes the provisions of the Norris-LaGuardia Act inapplicable. The provisions of the Norris-LaGuardia Act are also made inapplicable to the Section 302(e) provisions for restraining violations of Section 302, which is concerned with restrictions on payments to employee representatives.

These specific references to injunctions and to the Norris-LaGuardia Act at the minimum indicate that the Norris-LaGuardia Act was not pro tanto repealed by 301, and that injunctions were not to be included within the scope of the word "suits" in Section 301. They also support the conclusions of Senator Taft and President Truman. This conclusion is further reinforced by the elimination from the final Section 301 of Section 302(e) of the original House Bill 3020 which specifically provided that the Norris-LaGuardia Act would be inapplicable to the suits for breach of collective bargaining agreements permitted under Sec-

tion 302(a) of the House bill. If it had been the intention of the conferees that the provisions of the Norris-LaGuardia Act should be inapplicable to 301 suits, they would have expressly so drafted 301; the elimination of such a provision, which was definitely under consideration, can only mean it was not their intention to include injunctions within the scope of the word, "suits". The Committee of Conference report, House Report No. 510, June 3, 1947 confirms this when it discusses the elimination of 302(e), U. S. Code Congressional Service 80th Congress, First Session, 1947 at page 1172.

In summary, Section 301 is limited to suits for money damages; in no event can it be construed as authorizing an injunction or a suit for specific performance of an arbitration agreement.

QUESTION NO. 3

WHETHER THE DISTRICT COURT HAS JURISDICTION TO DECREE SPECIFIC PERFORMANCE OF AN AGREEMENT TO ARBITRATE SUCH A DISPUTE, DESPITE THE PROHIBITIONS OF THE NORRIS-LAGUARDIA ACT.

The prohibitions of the Norris-LaGuardia Act, 47 Stat. 70, (1932), 29 U.S.C. S 101 et seq., do not permit a District Court to decree specific performance of an agreement to arbitrate contained in a collective bargaining agreement. The provisions of Section 7 are clear and unequivocal.

> "Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing . . ."

The exceptions are clear and do not apply in the present case. No ambiguity exists as to the meaning of Section 7 and so there is no need for interpretation.

It was Congress' desire to keep the courts out of labor relations except in cases "involving violent or destructive acts". The First Circuit Court in *Local 205, U.E. v. General Electric Company* (1956) 233 F. 2d 85 now attempts to carve out another exception, viz.—cases involving orders to compel arbitration.

One of the reasons for the Norris-LaGuardia Act was the judicial erosion of the restrictions against injunctions contained in the Clayton Act, 38 Stat. 738 (1914) 29 U.S.C. Sec. 52. The First Circuit Court's effort to except specific performance of arbitration agreements from the provisions of Section 7 of Norris-LaGuardia represents just such another case of judicial erosion.

The instant case falls squarely within the interdictions of Section 7 of the Norris-LaGuardia Act.

QUESTION NO. 4

WHETHER THE UNITED STATES ARBITRATION ACT, 9 U.S.C. SEC. 1 ET SEQ. IS APPLICABLE TO AN AGREEMENT TO ARBITRATE IN A COLLECTIVE BARGAINING AGREEMENT.

If the United States Arbitration Act is applicable to an agreement to arbitrate future disputes in a collective bargaining agreement, the District Court can enforce such arbitration provision only if the jurisdictional requirements of Section 4 of the Arbitration Act are met.

The plain provisions of Section 4 require the party who is aggrieved by failure, neglect or refusal of the other party to arbitrate under a written agreement for arbitration and

who desires to enforce the arbitration provisions, to petition the District Court which, *save for such agreement, would have jurisdiction under Title 28* in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties. In other words, jurisdiction must be bottomed on Title 28.

In this case the jurisdictional requirements of Title 28 (as required by Section 4 of the Arbitration Act) have not been met and, therefore, the District Court was without jurisdiction to enforce the arbitration provisions of the collective bargaining agreement in the case at bar.

There is nothing in the Arbitration Act, and specifically in Section 4 thereof, which permits Title 29 jurisdiction to be substituted for Title 28 jurisdiction and specifically nothing in the Act which grants jurisdiction to enforce an arbitration provision, where the jurisdiction of the Court is bottomed on Section 301 of the Labor Management Relations Act. In this case the jurisdiction of the District Court is bottomed squarely on Section 301 of Title III of the Labor Management Relations Act of 1947, 29 U.S.C. Sec. 185.

Congress has not yet seen fit to amend Section 4 of the Arbitration Act to provide jurisdiction to enforce an agreement for arbitration when the jurisdiction of the District Court is grounded on Section 185 of *Title 29* and therefore the District Courts of the United States do not have jurisdiction to enforce arbitration provisions in a collective bargaining agreement until Sec. 4 of the Arbitration Act is amended or the right is spelled out by amendment to Section 301.

It seems reasonably certain, therefore, that Congress has not willed that the provisions of the Arbitration Act should apply to collective bargaining agreements.

The only appellate Federal Court which had considered the exclusionary clause in Section 1 and ruled on the question prior to the codification of the Arbitration Act had decided that the Act was not applicable to a collective bargaining agreement. *Gatliff Coal Co.* v. *Cox*, 6 Cir. 1944, 142 Fed. 2nd 876. While Congress would not be controlled by such an interpretation by a Federal Court of Appeals, it is reasonable to suppose that Congress had that interpretation in mind and did not see fit to change it when it enacted Sec. 185 of Title 29.

The legislative history of the Arbitration Act indicates that Congress intended to exclude from its operation all labor disputes. The legislation was drafted and sponsored by the American Bar Association and was in charge of its committee on Commerce, Trade and Commercial Law whose chairman testified before the Sub-committee of the Judiciary Committee, "It is not intended that this shall be an act referring to *labor disputes* at all." and suggested an amendment to clarify this intent, Hearings before Subcommittee of the Committee on Judiciary on S. 4214, 67th Cong., 4th Sess. 9 (1923). The suggested amendment excluded contracts of employment of seamen or any class of workers engaged in foreign or interstate commerce.

The exclusionary clause in Section 1 as finally enacted is substantially in the words suggested by the sponsors to clarify the intent that the Arbitration Act was intended to cover commercial disputes and was not to have application to *labor* disputes at all.

Hence (a) whether the collective bargaining agreement is held to be a contract of employment as held in *Lincoln Mills* v. *Textile Workers Union*, 5 Cir. 1956, 230 F. 2d 81 or not to be a contract of employment within the meaning of Sec. 1 of the Arbitration Act as held in *Local 205 U. E.* v.

General Electric Company, 1 Cir. 1956, 233 F. 2d 85, and (b) whether or not the employees here involved were actually engaged in the transportation industry or merely in the production of goods to be shipped in interstate commerce (See *Tenney Engineering, Inc.* v. *United Electrical R. & M. Workers*, 3 Cir. 1953, 207 F. 2d 450), the Arbitration Act cannot be made applicable to the labor dispute involved in this case until Congress has by legislative amendment enunciated the public policy that it now favors the application of the Arbitration Act to labor disputes and enforcement under the Arbitration Act of arbitration provisions in collective bargaining agreements.

The legislative history further indicates that the exclusion of contracts of employment in Sec. 1 was inserted at the behest of a labor union—International Seamen's Union—in order that the arbitration agreements in the maritime industry would not be specifically enforceable in the Federal Courts. At that time the only contracts involving seamen which contained arbitration clauses were collective bargaining contracts and not individual hiring contracts (see Note on Enforceability Under the U. S. Arbitration Act, 63 Yale L. J. 729, 731). Therefore, the words "contracts of employment" were intended to encompass collective bargaining agreements; *Signal-Stat Corp.* v. *Local 475, U.E.*, 2 Cir. 1956, 235 F. 2d 298. It is clear, therefore, that Congress intended that the Arbitration Act should not be applicable to collective bargaining agreements.

Had Congress intended, by Section 185 of Title 29, of the Labor Management Relations Act, to make the Arbitration Act applicable to collective bargaining agreements, and to provide jurisdiction in the District Court to enforce the arbitration provisions in such agreements, a simple amendment to Section 4 of the Arbitration Act would have accomplished that purpose or it could have been spelled out in Section 301.

QUESTION NO. 5.

WHETHER A UNION MAY PROSECUTE, BY WAY OF ARBITRATION PROCEDURE IN A COLLECTIVE BARGAINING AGREEMENT, THE PECULIARLY PERSONAL RIGHTS OF INDIVIDUAL EMPLOYEES TO RECOVER VACATION PAY, AND JUDICIALLY COMPEL ARBITRATION FOR THAT PURPOSE.

The specific matter raised under this question is the right of the union, as a party to a collective bargaining agreement, to enforce, by a judicially ordered arbitration, under the authority of Section 301, the individual rights of the employees to recover vacation pay and other fringe benefits to which the union claims the employees are entitled under the provisions of the collective bargaining agreement between the union and the employer.

It is settled by the Westinghouse Case that the union could not enforce, in an action brought by the union under 301 "the uniquely personal right of an employee for whom it has bargained to recover compensation for services rendered to his employer".

May the same result be accomplished by the union under 301 by a judicial enforcement of the arbitration provisions of the collective bargaining agreement, the ultimate purpose of which is to enforce payment, to the individual employees concerned, of the compensation by way of vacation pay or other fringe benefits to which they may claim to be entitled?

If, by the provisions of Section 301, Congress did not grant to a union the right to enforce claims to recover compensation for services rendered by employees for whom it had bargained, then it necessarily follows that Congress, by Section 301, did not intend to confer upon the union the

right to enforce, by a judicially ordered arbitration, under the authority of Section 301, those same uniquely personal rights of the individual employees to recover from the employer vacation pay and other fringe benefits which the individual employees claim to be entitled to receive when their respective employments were terminated in the course of a good faith plan of the employer to cease operations and close down and dispose of the mill property because of continued heavy losses. *Textile Workers Union* v. *Williamsport Textile Corp.*, D.C. M.D. Penna, 136 F. Supp. 407.

The decision of the Court of Appeals affirming the decree of the District Court, directing arbitration, is contrary to the decision of this Court in Westinghouse, and contrary to the interpretation of the Westinghouse case made by the Court of Appeals on the same day in *Local 205* v. *General Electric Company*, 2 Cir. 1956; 233 F. 2d 85.

In that case the Court stated at page 100 that the effect of the Westinghouse holding reflected in all the opinions of the majority justices "was to eliminate from 301 jurisdiction a complaint by a union that involves no more than a cause of action which is 'peculiar in the individual benefit' or 'the uniquely personal right of an employee,' or which 'arises from the individual contract between the employer and employee' ". And at page 101, "It seems to us therefore that that decision is to be interpreted as denying jurisdiction over a controversy only where the union is seeking a remedy, usually a judgment for damages which the individual could enforce in a suit on his personal cause of action."

Here the termination of the employment of the individual employees is the breach of the collective bargaining agreement alleged by the union in its complaint R 13-14

If the breach alleged did, in fact, occur, then a cause of action immediately arose in favor of the individual employee for the recovery of the damage suffered in the loss of the vacation pay and the other fringe benefits which were a part of the employee's compensation under his individual contract of employment and which were claimed to have been lost by reason of violation of the collective bargaining agreement.

QUESTION NO. 6

The Appealability of an Order Granting Specific Performance of an Arbitration Covenant.

The ruling of the District Court granting specific performance of the arbitration provisions of a collective bargaining agreement is appealable under 28 U.S.C.A. Sec. 1291.

The only relief prayed for in the complaint as finally amended was an order directing specific performance of the arbitration provisions of the collective bargaining agreement.

The complaint was not auxiliary to a main proceeding and did not pray for a stay of a main proceeding, pending arbitration. The complaint and prayer for arbitration was the main proceeding.

Hence, the order of the court directing specific performance of the arbitration provisions of the collective bargaining agreement was the granting of the only relief demanded in the complaint and was a final decree, appealable under Section 1291, and the Court of Appeals was right in determining that the order for arbitration was a final appealable decree under Section 1291, where the court granted the

only relief demanded in the complaint. *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.* 2 Cir. 1933, 62 F. 2d 1004, *Continental Grain Co.* v. *Dant & Russell, Inc.*, 9 Cir. 1941, 118 F. 2d 967.

It is obvious that the Second Circuit did not consider that in *Stathatos* v. *Arnold Bernstein SS Corp.*, 2 Cir. 1953, 202 F. 2d 525, it was overruling its prior decision in the Krauss Bros. case, because that case is not mentioned either in the decision of Chief Judge Clark or the dissenting opinion of Judge Frank.

The rule of *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955) or *Morgantown* v. *Royal Insurance Co., Ltd.* 337 U.S. 254, are not applicable to this case, as each involved an order or ruling of the court on a motion for stay pending arbitration. The ruling or order was simply a ruling as to the manner in which the court would try one issue in the case pending before it.

An order directing specific performance of the arbitration provisions of a collective bargaining agreement was the granting of an injunction, and, even if held to be interlocutory, was appealable under 28 U.S.C.A. 1292 (1).

CONCLUSION

As the District Court did not have jurisdiction or authority under Section 301 of the Labor Management Relations Act of 1947 to grant the relief of specific performance of the arbitration clauses of the collective bargaining agreement as held by the District Court and as the District Court did not have jurisdiction under Section 301 to grant the relief of specific performance of the arbitration clauses of the collective bargaining agreement in accordance with the provisions of Section 4 of the United States Arbitration

Act as held by the Court of Appeals, the decision of the Court of Appeals affirming the Decree of the District Court and the Decree of the District Court directing the enforcement of the arbitration clauses in the collective bargaining agreement in this case should be reversed and the complaint dismissed.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A

STATUTES INVOLVED

LABOR MANAGEMENT RELATIONS ACT, 1947, 61 Stat. 156, 29 U.S.C. Sec. 185.

SEC. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the Courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of action and proceeding by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his

acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

UNITED STATES ARBITRATION ACT, 43 STAT. 883, re-enacted 61 Stat. 669, 9 U.S.C. Secs. 1-14, as amended by Act of September 3, 1954, 68 Stat. 1233.

"Maritime transactions" and "commerce" defined; exceptions to operation of title

SEC. 1. "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Validity, Irrevocability, and Enforcement of Agreements to Arbitrate.

SEC. 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Failure to Arbitrate Under Agreement; Petition to United States Court having Jurisdiction for Order to Compel Arbitration; Notice and Service thereof; Hearing and Determination.

SEC. 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order

summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

NORRIS-LAGUARDIA ACT, 47 STAT. 71, 29 U.S.C. SEC. 107.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or willing to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restrain-

ing order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant, and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

65 STAT. 726, 28 U.S.C. Section 1291. Final decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

65 STAT. 726, 28 U.S.C. Section 1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands or of the judges thereof, granting continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

No. 262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

[illegible], Inc., *Petitioner*

v.

UNITED TEXTILE WORKERS OF AMERICA, A.F.L.
LOCAL [illegible], et al.

MEMORANDUM FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 262

GOODALL-SANFORD, INC., *Petitioner*

v.

UNITED TEXTILE WORKERS OF AMERICA, A.F.L. LOCAL 1802, ET AL.

MEMORANDUM FOR RESPONDENTS

I

Questions 1-4 and 7 of the petition herein set forth issues substantially the same as those presented by the pending petitions for certiorari in *Textile Workers Union of America* v. *Lincoln Mills,* No. 211, and *General Electric Co.* v. *Local 205, UE,* No. 276. These are important issues of federal law as to which there are clear conflicts among the circuits. Respondents do not, therefore, oppose the granting of certiorari with respect to these questions.

II

Questions 5 and 6 (set forth in the petition for certiorari herein on pages 2-3) were not mentioned by the Court of Appeals and do not present any issue substantial enough to warrant review in this Court. They should be excluded from any grant of certiorari.

The situation with respect to questions 5 and 6 is as follows:

The complaint here set forth the facts, the dispute between the parties, the collective bargaining agreement, and the Union's contention that the Company was required by the agreement to arbitrate the dispute. In its answer, the Company (petitioner herein) set forth, among other things, its conclusion that the collective bargaining agreement did not cover or purport to cover the factual situation presented (R. 28). Hence, it argued, the issues the Union sought to arbitrate were not arbitrable. The Union moved for summary judgment. The District Court concluded, on the basis of the undisputed facts and the terms of the collective agreement, that the issues were arbitrable and granted the motion for summary judgment. The Court of Appeals affirmed.

Petitioner does not seek to bring before this Court the merits of the dispute as to arbitrability. In questions 5 and 6, however, petitioner asserts that the District Court and the Court of Appeals were precluded from reaching their decision on this question by Rule 56 of the Rules of Civil Procedure. It is argued that Rule 56 required that, on the Union's motion for summary judgment, the District Court accept as true all of the allegations in the Company's answer, including the statement that the collective agreement did not cover the issues sought to be arbitrated.

This argument plainly confuses a motion for summary judgment under Rule 56 with a motion for judgment on the pleadings under Rule 12. Equally plainly, it overlooks the distinction between an allegation of fact and a conclusion of law.

Rule 56 permits summary judgment if there is "no genuine issue as to any material fact . . ." There was no issue of fact here. No trial could be had on the basis of the Company's allegation. That allegation was purely and simply a legal conclusion as to the meaning and effect of the contract. It amounted in substance to nothing more than a

general conclusion that the Union was not, on the admitted facts, and the admitted contract, entitled to the relief sought. The very purpose of Rule 56 is to permit summary judgment in such a situation and to avoid a trial in which there are no issues of fact to be tried.

III

This case does present one additional issue not set forth in the petition for certiorari. That issue is:

> Whether an order of a District Court under § 4 of the Arbitration Act, directing the parties to perform an agreement to arbitrate, is a "final" decision from which an appeal may be taken under 28 U.S.C. 1291.

This issue is discussed by the Court of Appeals on pages 3-4 of its opinion in this case, and the authorities on both sides clearly noted.

Baltimore Contractors v. *Bodinger*, 348 U.S. 176, establishes that where arbitration results, under § 3 of the Arbitration Act, from an order staying a pending action, no appeal lies if the main action is equitable in nature. The Second Circuit has applied the same reasoning when the stay is coupled with an affirmative order directing arbitration. *Wilson Bros.* v. *Textile Workers Union*, 224 F. 2d 176 (1955), *cert. denied* 350 U.S. 834, and has indicated that the same rule would be applied, for reasons of uniformity and policy, to an independent application to compel arbitration under § 4 of the Act. *Stathatos* v. *Arnold Bernstein S.S. Corp.*, 202 F. 2d 525 (1953). Conceding that "there is much force to this view", the First Circuit in this case nevertheless stated that it was more persuaded by older precedents which viewed an order to arbitrate under § 4 of the Arbitration Act as being final in the sense of 28 U.S.C. 1291.

The Second Circuit's reasoning in the cases cited may rest, in part at least, on its earlier holding that "Arbitration is merely a form of trial, to be adopted in the action

itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under the Federal Rules of Civil Procedure . . ." *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 381, 383. This Court, in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 202, expressly disagreed with that premise. It may be, therefore, that the Second Circuit would not now adhere to its view as to nonfinality, contrary to the First Circuit. But cf. *Turkish State Rwys.* v. *Vulcan Iron Works*, 230 F. 2d 108, 110 (3d Cir. 1956). We believe, however, that there is sufficient doubt about the issue—particularly in view of the First Circuit's expressed uncertainty—that it should be included in the questions presented for decision if certiorari is granted herein.

IV

CONCLUSION

For the reasons above set forth, it is respectfully submitted that any grant of certiorari herein should be limited to the following questions decided by the Court of Appeals: Questions 1-4 and 7 set forth in the petition for certiorari and the additional question noted in this Memorandum.

Respectfully submitted,

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No. 262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

GOODALL-SANFORD, INC., *Petitioner*

v.

UNITED TEXTILE WORKERS OF AMERICA, A.F.L. LOCAL 1802, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

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v.

UNITED TEXTILE WORKERS OF AMERICA, A.F.L. LOCAL 1802, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT

The petitioner here is Goodall-Sanford, Inc., a Maine corporation engaged in the manufacture and sale of textile products which move in interstate commerce. Until April 1955 it operated plants at Sanford and Springvale, Maine. (R. 39-40). It will be referred to herein as the Company.

The respondents are the United Textile Workers of America, A.F.L. (now affiliated with the AFL-CIO) and its Local 1802. They will be referred to herein collectively as the Union. The Union is the exclusive bargaining agent under the National Labor Relations Act for the production and maintenance employees of the Company at its Sanford and Springvale plants. (R. 39). On their behalf it entered into a collective bargaining agreement with the Company in October 1951. This agreement contained a typical grievance procedure, culminating in arbitration, for the resolution of disputes as to the "meaning and application of this

agreement" (R. 29). It also contained the usual provision that during the term of the agreement there should "be no resort to stoppages, slow downs, or other interference with the productive facilities of the company or to strikes or lockouts" (Art. XI, p. 41 of Exhibit A to the complaint).

The agreement was to have expired in 1953 but was renewed and amended at various times so that, as amended, it was to "continue in full force and effect" until July 15, 1955. (R. 40).

Beginning in December 1954 the Company began a process of liquidating these two plants. By April 1955 all production operations had ended and all of the real estate and building had been sold. (R. 33-34, 39-40).

During the process of curtailing production, the Company at various times notified groups of employees who had already been laid off that their employment was being terminated and that their names were being removed from the payroll records. (R. 38-39, 58). The Union protested these actions of the Company (R. 44-45), claiming that the Company had the right to lay off the employees but not to terminate them, thus preserving certain accrued rights as to fringe benefits which, under the contract, were payable to laid-off employees. Among these fringe benefits were insurance, pensions and vacations. Under the collective bargaining agreement insurance was required to be maintained in force for laid-off employees for the calendar month in which the layoff began and for one calendar month thereafter. (R. 14-19). The pension provisions of the collective bargaining agreement provided pensions for employees who reached the age of sixty-five and retired from employment with the Company. An employee with the required number of years of service who reached this age during a period of layoff was entitled to retire and receive a pension. (R. 20).

With respect to vacations, the collective bargaining agreement provided for vacation payments for all employees, in-

cluding those laid off during the vacation period, who had worked at least nine hundred hours in the twelve-month period from June 1 of the preceding year to May 31 of the vacation year. (R. 21-22, 26-28).

With respect to all of these provisions of the collective agreement it made a substantial difference to the employees whether their employment was regarded as terminated when the plant shut down, just as if they had quit or had been discharged, or if they were regarded as remaining in the status of laid-off employees. Under the collective bargaining agreement, the Union contended, termination of employment was specifically dealt with and it was there provided that such termination would occur only by virtue of a quit, discharge or absence from work for any reason (including layoff) for eighteen months. Hence, at least until the contract expired, the employees for whom no further work was available should be regarded as laid-off. Specifically, this meant that their insurance would be kept in effect for a month, that any employee who had served 20 years or more and who reached age 65 prior to July 15, 1955, would receive a pension, and that those employees who had earned a 1955 vacation by working 900 hours or more in the period since June 1, 1954, would receive their 1955 vacation pay. There was, of course, no attempt by the Union to require the Company to maintain operations or to provide actual employment.

The Union met at various times with the Company in an effort to resolve the dispute. (R. 44-45). These meetings proved unproductive of a settlement, and, on February 23, 1955, the Union notified the Company that it was requesting arbitration of the dispute in accordance with the provisions of Section B of Article VIII of the collective bargaining agreement. (R. 45).

In this article the parties agreed that any dispute not resolved in the grievance procedure "which relates solely to the meaning and application of this agreement . . . may

be referred to arbitration by written notice of either party to the other." They further provided that the arbitrator should be selected from a panel of three which had been agreed to by the Union and the Company and that the decision of the arbitrator so selected should be final and binding. (R. 29).

In its letter the Union submitted the names of the three persons who had arbitrated substantially all of the prior disputes between the Company and the Union during the last five years. (R. 45). The Company, however, refused to participate in the selection of an arbitrator and by letter dated March 8, 1955, notified the Union that it would not arbitrate the dispute since it did not regard the question of whether it had the right to terminate the employees as an arbitrable question under the collective agreement. (R. 46).

The Union thereupon, on March 15, 1955, filed its complaint in the present action. That complaint set forth the facts substantially as summarized above and, invoking Section 301 of the Labor-Management Relations Act, 1947, as the basis for jurisdiction, asked for an order compelling arbitration as well as other relief. (R. 8, 24). The Company's answer (R. 33-37) did not substantially dispute the facts as alleged in the complaint but argued that the Company had the absolute right to shut down all or any part of its business and, where there was no possibility of future reopening, to terminate its employees. This subject, the Company alleged, was not covered or attempted to be covered by the collective bargaining agreement and, therefore, the termination of the employees was not arbitrable under the contract.

The Union moved for summary judgment (R. 37) and the defendant moved to dismiss (R. 38) on the ground that, under the *Westinghouse* case, the district court did not have jurisdiction.

In an opinion dated June 1, 1955 (R. 39-49) and an

order dated June 13, 1955, the district court denied the company's motion to dismiss and granted the plaintiffs' motion for summary judgment. By its order (R. 49-51) the district court directed the parties to undertake to agree upon an arbitrator, provided that if they failed to so agree the court would itself designate an arbitrator, and directed that the parties submit the controversy, for final and binding arbitration, to the arbitrator so selected.

The district court rested its opinion that such relief was proper upon the provisions of Section 301 of the Taft-Hartley Act. It specifically held that the dispute between the parties as to the meaning and application of the collective bargaining agreement was arbitrable, finding that the dispute could be resolved only by interpretation of the various provisions of the agreement and that the contentions of the parties in respect thereto were not frivolous.

On appeal the Court of Appeals for the First Circuit first held that the order was appealable. It then proceeded to conclude, in accordance with its prior opinion in the *General Electric* case, now here on certiorari, No. 276, that there was no authority to compel arbitration by virtue of the provisions of Section 301 alone but that such authority could be found under the terms of the U. S. Arbitration Act. Examining the arbitration clause and relief ordered by the district court in terms of the Arbitration Act, the Court of Appeals concluded that the case substantially complied with the requirements of the Arbitration Act and that the relief actually granted, although not based on the Arbitration Act, was appropriate relief under that Act. Finally, as to the question of arbitrability of the controversy, the Court concluded that there was a real and substantial controversy which was arbitrable under the contract. It therefore affirmed the decree of the district court.

This Court granted certiorari on October 8, 1956, limiting its grant to the following questions set forth by the petitioner (R. 71):

1. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States jurisdiction where no other ground for Federal jurisdiction is alleged or claimed.

2. Whether Section 301 of the Labor Management Relations Act of 1947 granted to the District Courts of the United States equitable jurisdiction to grant injunctions or compel specific performance of arbitration clauses in a collective bargaining agreement.

3. Whether the District Court has jurisdiction to decree specific performance of an agreement to arbitrate such a dispute, despite the prohibitions of the Norris-LaGuardia Act.

4. Whether the United States Arbitration Act, 9 U.S.C. Sec. 1 et seq. is applicable to an agreement to arbitrate in a collecteive bargaining agreement.

7. Whether a union may prosecute, by way of arbitration procedure in a collective bargaining agreement, the peculiarly personal rights of individual employees to recover vacation pay, and judicially compel arbitration for that purpose.

and the additional question noted by the Union in its response:

Whether an order of a District Court under § 4 of the Arbitration Act, directing the parties to perform an agreement to arbitrate, is a "final" decision from which an appeal may be taken under 28 U.S.C. 1291.

SUMMARY OF ARGUMENT

In our argument in this case we follow the form, adopted by petitioners, of discussing each of the six issues set forth in the questions to which the grant of certiorari was limited. In doing so, we have also sought to answer the arguments made by petitioner in the *General Electric* case, No. 276, without undue repetition of arguments already presented

to the Court on behalf of the petitioner in the *Lincoln Mills* case, No. 211.

I. Section 301 is clearly a jurisdictional grant and therefore it is no argument against 301 jurisdiction that no other statutory ground of Federal jurisdiction is claimed. The use of the term "procedural" by Mr. Justice Frankfurter in describing Section 301 in the *Westinghouse* case was not intended, fairly read, to mean that jurisdiction cannot be based on Section 301, although one panel of the Fifth Circuit, with one judge dissenting, has so held—contrary to the three judges who participated in the *Lincoln Mills* case, No. 211.

There can be no constitutional issue here because such an issue can only arise if it is assumed that state law governs and, if it is so assumed here, the case is ended before the constitutional question is reached. We concede that no relief would be available here under the law of Maine. Relief can be granted here only on the assumption that Section 301 and the United States Arbitration Act, taken together or separately as governing grievance arbitration agreements in industries affecting commerce, make such agreements enforceable irrespective of state law.

Without arguing whether this is a question of substance or procedure, or whether Federal or state law governs in general in Section 301 suits, we assert that—however these questions are resolved—it must be concluded that Congress intended that the company's promise, in a collective agreement, to arbitrate grievances must be enforceable as uniformly as the union promise not to strike for which it is the counterpart and consideration. The two promises are in essence one: the parties agree that, during the term of the agreement, all grievances shall be settled by arbitration instead of by strikes. Indeed, several Circuits have even inferred a no-strike promise from a simple agreement that disputes shall be arbitrated. Since we think it clear that Congress intended the no-strike agreement to be en-

forceable by way of a suit for damages irrespective of state law, we think it must be inferred that Congress also intended the enforceability of the agreement to arbitrate to be similarly decided without reference to state law.

II. Section 301 does encompass suits for equitable relief as well as for damages. The arguments to the contrary are based on short-hand Congressional expressions not intended to be precise definitions of the Section's scope. That these expressions were not so intended is shown most clearly by the fact that most of these same expressions refer only to suits for damages *against unions*—yet the words of the statute and the authoritative materials clearly show that it was intended to provide for suits by, and against, both employers and unions. Furthermore, the fact that the House proposed to exempt breach of contract suits from the Norris-LaGuardia Act clearly shows that it understood that equitable relief would be available. Five Circuit Courts of Appeals are now agreed, without dissent, that equitable relief is available in a Section 301 action.

Petitioner in No. 276 urges that even if some such relief can be granted in a 301 suit, specific performance of an agreement to arbitrate cannot be given because Congress in 1947 specifically decided against changing the common law rule of non-enforceability of such agreements. Congress made no such decision. There is no evidence whatsoever that Congress in 1947 adverted to the common law rule, or considered that it would be applicable in suits brought under Section 301. Petitioner's argument is based on an erroneous inference from the Congressional decision to entrust the enforcement of collective agreements solely to the courts rather than also to the National Labor Relations Board. This decision was merely a choice of forum, dictated by the dangers of conflict if both forums were available. The other materials in the legislative history of the 1947 Act relied on by petitioner in No. 276 are torn out of

context and are totally unrelated to the problem here presented.

Petitioner in No. 276 also urges that in the period between 1925 and 1947 Congress repeatedly and deliberately refused to make grievance arbitration enforceable. To prove this rejection it cites Section 7 of the Railway Labor Act, as well as a number of proposals which were introduced but not acted upon. None of the examples is apt. Indeed the Railway Labor Act *does* require the equivalent of arbitration of grievances. Petitioner has failed to distinguish, in this example as in all the other instances cited, between grievance arbitration and the arbitration of "major disputes"—disputes over what the terms and conditions of employment shall be.

The plain historical fact is that Congress has never assumed, either explicitly or implicitly, that the historical rule against the enforcement of arbitration contracts was applicable to collective agreements. Indeed, it is doubtful that prior to 1947 it recognized collective agreements, as distinguished from individual contracts of employment, as contracts at all. In did, in 1947, decide that such recognition should be given. There is no evidence that Congress at that time assumed that the common law rule with respect to commercial arbitration would then arise, like a springing use, to prevent enforcement of a grievance arbitration clause. To the contrary, it was necessarily implicit in the Congressional scheme that such clauses would be enforceable.

III. The Norris-LaGuardia Act does not bar the relief granted below. In addition to the argument set forth in petitioners' brief in the *Lincoln Mills* case, No. 211, we point out that five Circuit Courts of Appeal have now concurred in this conclusion without a single dissenting vote. To hold that the Act does bar relief would not lead to equality or mutuality of remedies but, rather, the grossest kind of inequity. Concededly, the Act does bar injunctive relief

considered the question to be solely one as to which forum should be used. The House conferees wanted the terms of the collective agreements to be subject to "interpretation and application" by the courts, not the Board. The Senate conferees recognized that, if both forums were available, there would probably be conflicts. Therefore, they both agreed that the appropriate forum should be the district court, without the slightest suggestion that the remedy of specific enforcement, which would have resulted from a Board proceeding, would not be available in court.

To buttress its argument as to the intention of Congress, petitioner in No. 276 relies on other materials wholly unrelated to the question here in issue. Thus, it quotes, on p. 47, a portion of the conference report dealing with Section 8(d) as if it were part of the discussion of the deletion of proposed Sections 8(a)(6) and 8(b)(5). Section 8(d) as it passed the Senate said that the duty to bargain included the duty to negotiate with respect to an agreement "or *the settlement of* any question arising thereunder."[18] The conferees eliminated the italicized words. In explaining this, the House Conference report said that the words in question "might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract,"[19] and hence they were deleted. It is perfectly plain that this whole sequence had nothing to do with arbitration at all and, if it did, the fear of the House conferees was that employers would be compelled, by the terms of Section 8(d), to agree upon that form of settlement of grievance disputes. The question of whether employers who had already so agreed could be compelled to live up to their agreements was obviously irrelevant to Section 8(d).

Equally irrelevant is the citation of unpassed bills pro-

[18] H.R. 3020, as passed the Senate, 1 Leg. Hist. (1947) 242.

[19] House Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 35; 1 Leg. Hist. (1947) 539.

viding for "compulsory arbitration in certain labor disputes." [20] Compulsory arbitration—in the sense of a rule outlawing strikes and compelling arbitration as a device for settling unresolved disputes as to what the terms of a contract shall be—is totally different from the enforcement of voluntary agreements to arbitrate grievances arising under a contract.

The fact that Congress did not decide to adopt a system of compulsory arbitration as a method for settling disputes as to what wages or contract terms should be imports nothing as to the intention of Congress with respect to the enforcement of voluntary agreements to arbitrate disputes as to the application or interpretation of existing agreements.

D. The Claim That Congress Has Repeatedly Expressed the View That Arbitration Provisions in Collective Agreements Should Not Be Enforceable.

In support of its contention that Congress in 1947 specifically decided that it should not provide for the enforceability of the arbitration provisions of collective agreements, as well as its contention that such agreements are excluded from the Arbitration Act, petitioner in No. 276 repeatedly asserts that the whole history of labor and arbitration legislation, from 1923 through 1947, reveals a Congressional "judgment that agreements to arbitrate labor controversies should not be specifically enforceable." [21]

Petitioner is able to make this kind of sweeping statement only because it again fails to distinguish between grievance arbitration, under an agreement providing for arbitration of disputes as to its application and interpretation, and what we have called contract arbitration. (See Brief for Petitioner in No. 211 at pp. 21-22).

Thus much is made of the fact that in the Railway Labor Act, and particularly §7, Congress provided only for "volun-

[20] Brief for Petitioner in No. 276, pp. 47-48.

[21] Brief for Pet. in No. 276, p. 39. See also pp. 19-22, 28-29, 39-40.

tary arbitration" and said that the failure to arbitrate "shall not be construed as a violation of any legal obligation." 45 U.S.C. § 157. From this it is argued that Congress intended to maintain the rule that agreements to arbitrate are not enforceable.

This compounds confusion. First, as this Court patiently explained in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728, the Railway Labor Act sharply distinguishes between "disputes over grievances and disputes concerning the making of collective agreements." 325 U. S. at 722. Under the Railway Labor Act grievance disputes are traditionally referred to as "minor disputes" and disputes concerning the making of an agreement are referred to as "major disputes." In railway terminology, what we have in this case, and in Nos. 211 and 276, is a "minor dispute."

Now, in the Railway Labor Act, Congress itself provided for a statutory arbitration system for settling minor disputes through the mechanism of the National Railroad Adjustment Board. No employer can refuse to permit grievances to be heard and decided through its procedures. But, as to major disputes, as this Court noted, Congress did retain the "traditional voluntary processes of negotiation, mediation, *voluntary arbitration*, and conciliation." [22] " 'Major disputes' go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7. . . ." [23]

Section 7 of the Act deals with agreements to arbitrate specific controversies. It does not cover a general agreement that grievances shall be arbitrated. No such agreement is necessary under the Act because the Act itself provides the statutory grievance procedure of the Adjustment Board, with its provision for the appointment of neutrals where the representatives of the parties are unable to agree, 45 U.S.C. § 153, First (l). But, even passing the fact that petitioner

[22] 325 U.S. at 725, emphasis added.

[23] *Ibid.*

is referring to the wrong kind of arbitration, the fact is that the Railway Labor Act *does* make an agreement to arbitrate even a major dispute binding and irrevocable. The words in § 7 quoted by petitioner were inserted to make it clear that there is no obligation to agree to arbitration in the first place. But the statute also provides, in § 8, that an agreement to arbitrate, once it is made, "shall not be revoked by a party to such agreement." 45 U.S.C. § 158.

These provisions, says petitioner in No. 276, show that "on the occasions, prior to 1947, when Congress considered arbitratoion legislation it clearly revealed its judgment that agreements to arbitrate labor controversies should not be specifically enforceable." To the contrary, we say, if these provisions show anything they show that Congress' judgment has consistently been that grievances ought to be arbitrated and that the parties to agreements to arbitrate should not have "the power, if not the right, to defeat the intended settlement of grievances by declining to join" in the arbitration process. *Elgin, J. & E. R. Co.* v. *Burley*, supra, at pp. 725-726.

Similar comments apply to the petitioner's reliance on the 1928 proposals of the American Bar Association, the proposed arbitration provisions in the Wagner Act which were abandoned in 1935, and the failure of Congress to enact a 1942 bill dealing with "labor arbitration" (S. 2350, 77th Cong., 2d Sess.) which, according to petitioners, would "provide judicial enforcement of arbitration clauses in collective agreements," [24] as well as its reliance, in connection with the Arbitration Act, on union opposition to the Kansas Industrial Relations Court Act of 1920.[25]

In none of these instances was attention focused on the question of whether the common law rule against enforcement of arbitration provision should be applied to collective agreements. Indeed, it is highly dubious that in the 1920's

[24] Petitioner's Brief in No. 276, p. 21.
[25] *Id.* at p. 15.

anyone seriously considered a collective agreement as a contract which could be enforced in any way—a defect which Congress remedied in 1947. What was really involved in the schemes proposed in the 20's was "industrial arbitration"—a method of settling disputes as to what wages, hours and working conditions should be by rate-setting machinery similar to that provided for public utilities, instead of by free collective bargaining.[26] And even where it was proposed to make such a system voluntary rather than compulsory, again the proposal was, as in the 1942 bill, to provide a mechanism for providing arbitration "to settle . . . any controversies concerning past, present or future rates of pay, wages, hours of employment and any other and different past, present or future terms or conditions of employment." S. 2350, 77th Cong., 2d Sess., § 2A, 88 Cong. Rec. 2073.

The plain historical fact is that Congress never explicitly considered the question of whether the common law rule against enforcement of agreements to arbitrate disputes under existing contracts was applicable to collective bargaining agreements. If, prior to 1947, it was assumed that such arbitration provisions were not enforceable it was because it was assumed that collective agreements were not contracts at all. The common law rule had been abolished in the Federal Courts by the United States Arbitration Act (except for the individual employment contracts of seamen and similar workers).

It was not until 1947 that Congress decided, in Section 301, that "statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step."[27] But even then, no explicit attention was given to the enforceability of a promise to arbitrate grievances contained in such an agreement. It is therefore necessary to derive from the general purposes of Section 301

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[26] See 50 A.B.A. Rep. 362-363 (1923).

[27] S. Rep. No. 105, 80th Cong., 1st Sess., p. 17; 1 Leg. Hist. (1947) 423.

what Congress would have intended if it had explicity considered the question.

As to that, we have no doubt. As is set forth in petitioner's brief in the *Lincoln Mills* case, No. 211, at pp. 39-45, the clear Congressional intention in Section 301 was to promote industrial peace by assuring that, once the parties entered into an agreement providing that there should be no strikes but that disputes as to its application would be arbitrated, the agreement would be performed.

When it said that collective agreements should be mutually enforceable like other contracts, Congress certainly did not mean or intend that the common law rule against arbitration, which had been abolished for other contracts, should be resurrected to defeat Congress' avowed purpose. Necessarily implicit in its passage of Section 301 was the assumption that the agreement to arbitrate, which is the counterpart and consideration for the agreement not to strike, would be enforceable in the Federal courts.

III WHETHER THE DISTRICT COURT HAS JURISDICTION TO DECREE SPECIFIC PERFORMANCE OF AN AGREEMENT TO ARBITRATE SUCH A DISPUTE, DESPITE THE PROHIBITIONS OF THE NORRIS-LAGUARDIA ACT.

Our argument on this point is set out fully in petitioner's brief in the *Lincoln Mills* case, No. 211, at pp. 18-23. We respectfully refer the Court to that brief. We wish to note here only two additional points.

First, in addition to the First, Fifth and Sixth Circuits, the Third and Seventh Circuits have now also held that the Norris-LaGuardia Act does not bar equitable relief to compel an employer to comply with the terms of a collective bargaining agreement. *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956); *United Steelworkers of America* v. *Galland-Henning Mfg. Co.*, 39 LRRM 2384 (7th Cir., Feb. 4, 1957). In the *Galland-Henning* Case, the Seventh Circuit unfortunately

joined the Fifth in holding that the Federal district courts cannot enforce an agreement to arbitrate in a § 301 suit if such an agreement would not be enforced by a state court. But it explicitly overruled the decision of the district court in that case that such relief was barred by the Norris-LaGuardia Act. 39 LRRM at 2386. No Court of Appeals is to the contrary and, indeed, in none of these cases nor in any of the earlier decisions was a single dissent expressed on this point.

Second, a word should be said about the heavy emphasis placed by petitioner in No. 276 upon the argument that it would be both unfair and contrary to the chief object of Congress, in 1947, to provide for equality between unions and employers, to hold that the Norris-LaGuardia Act does not bar equitable relief here. The union's agreement not to strike but to arbitrate is unenforceable because of the Norris-LaGuardia Act, petitioner says. Therefore, the only fair result, and the only result consistent with the theory of equal obligation contained in the 1947 Act, is to say that the employers promise to arbitrate is similarly barred. (Petitioner's Brief in No. 276, pp. 64-65.)

What this argument forgets to note is that Section 301 does give the employer a remedy in damages for any loss it may suffer as a result of a strike in violation of a collective agreement. And while it can be argued that this remedy is not quite as effective as an injunction against the strike, it is a substantial and effective remedy. Substantial damages can be recovered if they have been caused by the strike, as in *Teamsters* v. *W. E. Mead, Inc.*, 230 F. 2d 576 (1st Cir. 1956) ($359,000).

But, if petitioner is correct, there would be no remedy at all for a union if the employer refused to perform his agreement to arbitrate grievances. Under the common-law rule which petitioner so vigorously espouses, only nominal damages can be recovered for breach of an agreement to arbitrate. *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. 787

(S.D. N. Y., 1900) *aff'd* 102 F. 926. *Aktieselskabet Korn- og Foderstuf Kompagniet* v. *Rederiaktiobologet Atlanten*, 250 Fed. 935 (C.C.A. 2, 1918) *aff'd* 252 U.S. 313. And, even if the common law rule should be held inapplicable to grievance arbitration, a remedy in damages would be virtually meaningless for a union. How could such damages be shown? And how would they be measured?

Contrary to petitioner's argument, the really one-sided result would be the result it argues for. In that case, an employer could be made whole for any losses it suffered because of a union's violation of its no-strike agreement, but the union would be utterly unable to obtain the consideration for which it made the promise not to strike. The balanced policy which petitioner urges Congress intended will in fact be effectuated if the Court holds that either party, company or union, can specifically enforce an agreement to arbitrate grievances but that neither company nor union can obtain injunctive relief against a strike or lock-out.

IV—WHETHER THE UNITED STATES ARBITRATION ACT IS APPLICABLE TO AN AGREEMENT TO ARBITRATE IN A COLLECTIVE BARGAINING AGREEMENT.

The applicability of the United States Arbitration Act in a suit brought under Section 301 involves a whole series of separate questions:

A. Whether a collective bargaining agreement is a contract "evidencing a transaction involving commerce" within the meaning of Section 2.

B. Whether a collective bargaining agreement is a "contract of employment" within the meaning of the exclusion in Section 1.

C. Whether the exclusion in Section 1 shall be construed as covering only contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" or shall be construed

more broadly to cover all workers engaged in production affecting commerce.

D. Whether an order to compel arbitration under Section 4 can only be issued if the Court has jurisdiction under Title 28 of the U.S. Code.

E. Whether an order to compel arbitration under Section 4 can be issued in a case in which, under *Westinghouse*, the union could not bring suit if there were no agreement to arbitrate.

Petitioner in this case basically argues only issue D. It also argues that, however issues B and C are resolved, it is clear that Congress did not intend the United States Arbitration Act to be applicable to collective bargaining agreements. Petitioner in the *General Electric* case, No. 276, argues all five of the questions, although without clearly separating some of them.

Argument has already been presented to the Court on most of these issues in petitioners' brief in the *Lincoln Mills* case, No. 211, at pp. 50-60. We respectfully refer the Court to that brief and will here add only such additional argument as we think is made necessary by the arguments presented by petitioner in this case and petitioner in No. 276.

A. Whether a Collective Bargaining Agreement Is a Contract "Evidencing a Transaction Involving Commerce" Within the Meaning of Section 2.

Petitioner in No. 276 argues that the Court below erred in assuming that a collective bargaining agreement was a contract "evidencing a transaction involving commerce." Without clearly separating its arguments on this issue from its arguments with respect to the exclusion of contracts of employment, it appears to argue that the language "evidencing a transaction" was peculiarly suited to the intention of Congress to provide for the enforceability of arbitration in commercial contracts and that it is simply not apt to read

that language as covering a collective bargaining agreement.

Unfortunately this argument, logically pursued, directly conflicts with the petitioner's argument as to the meaning of the exemption of "contracts of employment". The exemption was added after the bill was originally introduced and petitioner argues strongly that it came as a result of the objection of the International Seamen's Union to the effect of the bill as first proposed on arbitration clauses in collective bargaining agreements. As has been pointed out elsewhere [28] this contention is erroneous: the objection was to the effect of the bill on individual contracts of employment. Specifically, the concern of the Seamen's Union was with the contracts embodied in the individual shipping articles which are signed by every seaman. But the fact that the bill, without the exemption, concededly would have covered contracts of employment, as well as collective agreements, clearly negates the contention that such contracts do not "evidence a transaction involving commerce."

B. and C. Whether the Exclusion of "Contracts of Employment of Seamen, Railroad Employees, or Any Other Class of Workers Engaged in Foreign or Domestic Commerce", Makes the Arbitration Act Inapplicable

This exemption concededly was written into the Act at the instance of the International Seamen's Union. But it is not true, as petitioner in this case claims, that at the time the Arbitration Act was passed "the only contracts involving seamen which contained arbitration clauses were collective bargaining contracts and not individual hiring contracts." [29] To the contrary, as has been explained in petitioners' brief in No. 211, at pp. 53-58, the contracts containing arbitration clauses with which the Seamen's Union was concerned were precisely the individual hiring contracts.

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[28] Brief for Petitioner in No. 211, pp. 53-58.

[29] Petitioner's Brief in No. 262, p. 20.

The entire argument, set forth in the briefs in all three cases here, as to whether Congress meant, by the exemption of contracts of employment, to refer to individual contracts of hire or to collective agreements, seems to us to pose a false issue. The issue is false because it reads back into the legislative history of the 20's an awareness of the status of a collective agreement as a separate contract which simply did not then exist. Whatever theory may today commend itself to Congress or the courts as to the status of a collective agreement, it seems fairly clear that thirty years ago there was no general recognition of any such theory. Contracts of employment—in the sense of individual contracts of hire—were the only contracts recognized as such.[30] And it is asking too much to read the legislative background of the United States Arbitration Act with a microscope to see

[30] Mr. Justice Brandeis seems to have regarded the collective agreement as simply an agreement made by the union as agent for the employees, not as a separate agreement with the union as such. ". . . the workingmen's agreement is made not by individuals directly with the employer, but by the employees with the Union and by it, on their behalf, with the employer . . ." *Hitchman Coal & Coke Co. v. Mitchell*, 243 U.S. 229, 270 (dissenting opinion).

Some such theory seems to be the explanation of Andrew Furuseth's remarks, relied on by petitioner in No. 276, with respect to the application of the proposed Act to union agreements. His concern, as we have pointed out in our brief in the *Lincoln Mills* case, No. 211, at pp. 53-58, was with the individual hiring contracts of seamen and the economic pressure which would cause them to sign shipping articles containing arbitration provisions. Having made this point, he then asked, in the passage quoted by petitioner, whether union organization would make any difference. In answering this question, he first said —as quoted by petitioner—that the organization would be bound. But this was not his concern. His concern was with the individual contracts of employment. Hence, he immediately asked: "But would such action bind the members?" (Proceedings, 24th Convention of the International Seamen's Union of America (1921) p. 204). And he answered this question by arguing that the Courts might hold that, on an assumed analogy to corporation law, the action of the union would bind the individual members. Clearly he meant by this analogy that the agreement to arbitrate would be deemed to be included in the individual member's "contract of employment."

if Congress intended to exempt from the Act a kind of an agreement which it would not even have recognized as a contract.

In 1947 Congress decided that a collective agreement not only should be given recognition as a contract, independent and separate from the individual contracts of employment, but also that such an agreement should be enforceable in the Federal courts. How is this Court, then, to treat the exemption which was written in an earlier era? This depends, we believe, on how much force the Court will give to Section 301 standing alone. We believe that, even without reference to the Arbitration Act, Section 301 is a sufficient basis upon which to conclude that the promise to arbitrate grievances is specifically enforceable. But, if the Court should not so conclude, then at the very least it should conclude that the statutory recognition of the collective agreement as a contract, separate and apart from the individual's contract of employment and enforceable as such against the union, not its members, is a sufficient basis upon which to decide that the exemption of "contracts of employment" in the Arbitration Act does not apply to it.

D. Whether an Order to Compel Arbitration Under Section 4 Can Only Be Issued If the Court Has Jurisdiction Under Title 28 of the U.S. Code

This question need not be considered at length. It rests, essentially, on the fact that Congress did not put § 301 in the Judicial Code. Certainly the reference in Section 4, as originally enacted, to jurisdiction "under the judicial code at law, in equity or in admiralty" was not meant to apply to anything less than the full range of federal jurisdiction then existing. The later amendment which substituted the words "Title 28" in Section 4 was not intended to make any substantive change whatsoever.

In any case, even if Section 4 should be held inapplicable on any such hypertechnical reading of its words, Section

2 of the Arbitration Act remains applicable. Section 2 establishes the general principle that agreements to arbitrate "shall be valid, irrevocable, and enforceable." Section 4 simply provides a simplified procedure, by petition, and on only five days' notice, by which to obtain an order directing arbitration. If it is inapplicable, then parties seeking to enforce arbitration provisions will be required to proceed in the normal manner by complaint and motion for equitable relief, as the plaintiffs in fact did in this case. The agreement is nonetheless enforceable if the Act is applicable, and the decision below is correct.

E. Whether an Order to Compel Arbitration Under Section 4 Can Be Issued in a Case in Which, Under Westinghouse, the Union Could Not Bring Suit If There Were No Agreement to Arbitrate

This question can briefly be disposed of, and on the same principle as the prior question. If the *Westinghouse* case is to be given a broad interpretation (see Point V below) and Section 4 is to be read narrowly, then the expedited procedure provided in Section 4 might be held inapplicable if the underlying grievances concern wage claims for which the union could not sue absent an agreement to arbitrate, but applicable if the grievances concern other matters for which the union could sue. This may not seem to be a reasonable rule. But it is not important for the result in this case, since the Section 4 procedure was not used.

V—WHETHER A UNION MAY PROSECUTE, BY WAY OF ARBITRATION PROCEDURE IN A COLLECTIVE BARGAINING AGREEMENT, THE PECULIARLY PERSONAL RIGHTS OF INDIVIDUAL EMPLOYEES TO RECOVER VACATION PAY, AND JUDICIALLY COMPEL ARBITRATION FOR THAT PURPOSE.

If this Court should affirm the judgment below, either on the Circuit Court's ground that the Arbitration Act is applicable in a § 301 action, or on the ground adopted by the District Court that § 301 is itself a sufficient basis, then the

order of the District Court directing the Company to proceed to arbitrate in accordance with its agreement will become effective. In that arbitration, the Union may be successful in obtaining a decision that the Company had no right to terminate its employees *instanter* but was required to treat them as laid-off. If the arbitrator should so decide then, under the collective agreement, some of these employees would become entitled to the vacation pay which they earned prior to their purported termination by the Company. Others may become entitled to pensions if they had served the required number of years of service and reached the required age subsequent to their termination by the Company and prior to July 15, 1955.

Ultimately, then, the consequence of the Union's suit here may be the securing of vacation pay and pension rights for some of the employees. Therefore, argues petitioner in this case (Brief, pp. 21-23), this is a suit to enforce the personal rights of the employees and is not cognizable under § 301(a) under the rule laid down in the *Westinghouse* decision. The same argument is made in the *General Electric* case, No. 276 (Petitioner's Brief, p. 52) because there the questions to be arbitrated are a discharge and a job classification dispute.

There are two answers to this argument. The first, and simplest, is that this is *not* a suit to recover vacation pay or pensions and No. 276 is *not* a suit to have an employee reinstated or a job classification changed. In both cases, the breach of the collective agreement which is sought to be remedied is the refusal to perform the promise to arbitrate. If that promise is performed and if, in the arbitration, it should be held that the Company did not correctly interpret and apply the collective agreement, then the individual employees may have personal rights. But at this stage the Union is not seeking to litigate those rights. It is seeking only performance of the promise made to it, and not to the employees individually, to arbitrate.

This first answer is sufficient and, we believe, unanswerable. But concededly it may lead to a rather odd result. If the Union's position is upheld in arbitration, and if the *Westinghouse* case is to be read as the petitioners in this case and in No. 276 read it, then the Union may be able to compel arbitration but not enforcement of the arbitrator's award. This is a permissible result but, we think, not a desirable one.

The better answer to petitioner's contention is to read the *Westinghouse* case much more narrowly than petitioners in these cases do. In *Westinghouse*, it was alleged simply that the employer had failed to pay salaries due and owing to the employees under the terms of the collective agreement. Although in fact the underlying conflict was one of interpretation of the collective agreement, no such controversy was alleged; the complaint merely set forth that "Defendant failed and refused to pay" the employees and that such failure constituted a violation of the collective agreement.[31]

It is possible to read the *Westinghouse* case, therefore, as covering only the case in which a union seeks to enforce, through judicial process, the claim of an individual employee for wages which the employer simply refuses to pay. Obviously such cases can and do arise. And there are also many cases in which there is only a factual dispute such as whether the employee actually worked the hours for which the company refuses to pay.

In those cases it is possible to say, as the Chief Justice and Mr. Justice Clark said, that a suit by the union would be simply a suit to enforce "the uniquely personal right of an employee . . . to receive compensation for services ren-

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[31] Record, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, No. 51, October Term, 1954, p. 6. The complaint also, it is true, asked for declaratory relief as to the meaning of the contract but this Court treated the case as if this prayer did not exist.

dered." 348 U.S. at 461. It is possible to say, as Mr. Justice Reed said, that the duty to pay wages is a duty owing to the employee not to the union. 348 U.S. at 464. And it is also possible to say, as Mr. Justice Frankfurter said, that the grievances are "peculiar in the individual benefit which is their subject-matter." 348 U.S. at 460.

But entirely different considerations appear where the union alleges not simply a refusal to pay but that the failure to pay resulted from the application by the employer of a rule of interpretation of the collective agreement contrary to the intent and purport of that agreement. In such a case, the union alleges much more than a violation of the employee's personal right to receive compensation. It alleges a genuine dispute between the contracting parties as to what their contract means. And, if the *Westinghouse* case is read narrowly, it does not hold that the union cannot bring suit to obtain an adjudication of that controversy.

What we are saying, simply, is that a difference can be found between a case in which the claim is that the employer simply refuses to pay in accordance with the agreement and a case in which the claim is that the employer has, in effect, amended the agreement. Clearly if the claim was that the employer had actually adopted a unilateral change, applicable to all in the future in the wage rates or other conditions upon which he had agreed in the collective agreement, he would breach his contract with the union, and more than the "uniquely personal" rights of the particular employees first affected would be involved. When the union claims that the employer has followed a rule of application and interpretation which is contrary to the agreement it in effect makes a similar claim.

The *Westinghouse* case can be read, we believe, as simply not covering that kind of case. If it is so read, at least some of the difficulty with the case disappears. The union will have the right to vindicate its own interest, as the collective representative of all the employees, in the agreements which

against a union strike in violation of an arbitration-no strike provision. But an effective remedy in damages exists. Indeed, one of the specific objectives of Section 301 was to provide such a remedy. But a union cannot recover damages for a company violation of the promise to arbitrate. The only method of achieving the balanced effect which Congress intended in 1947 is to hold that the Norris-LaGuardia Act does not bar specific enforcement, at the behest of either party, of the agreement to arbitrate.

IV. The arguments presented by petitioners in this case and in No. 276 against reliance on the Arbitration Act are erroneous. The argument that collective agreements do not "evidence a transaction involving commerce" seems inconsistent with the argument that the exemption of "contracts of employment" was necessary to exclude such agreements from the Act.

With reference to the exemption itself, it seems to us that the effort, on both sides, to find whether Congress intended to include in the exemption union agreements, as opposed to individual contracts of hire, is bound to fail since it is highly doubtful that in 1925 Congress would have regarded the union agreement, as such, to be a contract at all and hence the question could not even arise. The problem is created because, in 1947, Congress decided to give statutory recognition to the union agreement as such. In light of its expressed purpose then, we think it illogical to conclude that Congress intended this newly recognized form of contract to be included in the 1925 exemption of "contracts of employment."

The arguments as to Section 4 of the Arbitration Act are irrelevant, since the expedited procedure there provided was not used in this case.

IV. The arguments presented by petitioners in this case mate result may be that it will be decided in the arbitration ordered that certain employees are entitled to benefits. It

does not follow, however, that these suits are barred by the *Westinghouse* decision, even if that decision is broadly read, since the object of the suits in all three cases now before the Court is not to recover the benefits for the individual employees but to vindicate the promise to the union that grievances will be arbitrated. This fact sufficiently serves to distinguish the *Westinghouse* case.

A better distinction, however, is to read the *Westinghouse* case much more narrowly than petitioners in these cases do. *Westinghouse*, we believe, can properly be read as simply excluding from the scope of Section 301 those suits in which a union claims that an employer has failed and refused to pay the compensation provided in the collective agreement. Where, as here, the claim is not simply that the employer has refused to provide benefits but is a claim that the company has adopted a rule of interpretation, applicable to all employees, which is contrary to the intent and purport of the collective agreement, a genuine controversy with the union as to its agreement with the employer is involved. In such a case, more than the "uniquely personal right" of a particular employee is involved and the controversy is not "peculiar in the individual benefit" which is its subject matter. Therefore, we believe, the *Westinghouse* case should not be read as excluding such a case.

VI. The question of whether an order directing arbitration is a "final" decision from which an appeal may be taken under 28 U.S.C. 1291 only arises if the Court relies upon the Arbitration Act as the authority for granting the remedy sought here. It is possible to hold, as the Second Circuit has, that in a commercial arbitration the order to arbitrate is merely a step in the litigation between the parties and is therefore not a final decision from which an appeal can be taken if the original cause of action is equitable in nature. The rule of *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, can be argued to be applicable in a case begun by petitioner for an order directing arbitration

as well as in a case in which a suit is stayed pending arbitration.

On the other hand, in a grievance arbitration it seems fairly clear that the order directing arbitration is in fact the full and final relief requested by the plaintiff. This serves, we believe, to emphasize our view that grievance arbitration is so different from commercial arbitration that the historical rule against enforceability of abitration agreements is simply inapplicable and, hence, no recourse is needed to the provisions of the Arbitration Act. If the Court should disagree with this view, and hold the Arbitration Act applicable, the question of appealability which was raised *sua sponte* by the Court of Appeals will have to be decided here. We express no opinion on that issue.

ARGUMENT

INTRODUCTION

Petitioner here has presented its argument in the form of answers to each of the six specific questions to which the Court has limited its grant of certiorari. As respondents we will also follow this form, first discussing the issue presented by each question and then answering the specific arguments made by the petitioner. Since the disposition of these questions by the Court of Appeals for the First Circuit in the present case rested on its earlier decision in *Local 205* v. *General Electric Co.*, 233 F. 2d 85, which is also before the Court in No. 276, we will also attempt, within this form, to answer the arguments against that holding presented by petitioners in their brief in No. 276.

I—WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 GRANTED TO THE DISTRICT COURTS OF THE UNITED STATES JURISDICTION WHERE NO OTHER GROUND FOR FEDERAL JURISDICTION IS ALLEGED OR CLAIMED.

A. The Question

The issue here tendered, as the question is formulated by petitioner, seems to be whether Section 301 is to be inter-

preted as a grant of Federal jurisdiction in any case. If there is no jurisdiction under Section 301 in this case because "no other ground for Federal jurisdiction is alleged or claimed," then there can never be a case in which jurisdiction can be said to be based on Section 301.

Although no substantial argument is made by petitioner in support of the proposition that § 301 is not a jurisdictional grant, there is language in the opinion of Mr. Justice Frankfurter in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, which, if read without regard to the balance of the opinion, can be cited in support of that position. Thus, the opinion states that the section should be read as merely giving "procedural directions" to the Federal Courts (p. 443) that the authoritative materials indicate the "strictly procedural aim of the section" (p. 447), and that as a whole the legislative history reinforces the meaning of the statute "as a mere procedural provision" (p. 449). However, the balance of the opinion makes it clear that the word "procedure" in all of these cases was used only as the antithesis of the word "substance" and that it was not meant to be implied that, with respect to cases found to be within its scope, the section was not to be read as a jurisdictional grant. Thus, at p. 442, the question is said to be the ascertainment of the "jurisdictional scope" of the section, at p. 449 the constitutionality of a "grant of jurisdiction over a contract governed by state substantive law" is presented as a problem and finally, at the end of the opinion, it is concluded only that in the light of the right of the employees to sue in a state court, Section 301 should not be construed as conferring "jurisdiction over a suit such as this one." (p. 461).

Fairly read, therefore, Mr. Justice Frankfurter's opinion in the *Westinghouse* case gives no support to the proposition that the District Court had no jurisdiction here under § 301 simply because there was no other ground for Federal jurisdiction. Nothing in the other opinions, of course, even

intimates that result. And the language and legislative history, whatever may be its other ambiguities, is perfectly clear in granting jurisdiction to the Federal courts to hear the cases coming within the scope of the section.

We should point out to the Court, however, that in *I.L.G.W.U.* v. *Jay-Ann Co.*, 228 F. 2d 632 (1956), two judges of the Court of Appeals for the Fifth Circuit seem to have adopted a position strikingly similar to that implied in petitioner's question.[1] Adopting a restrictive reading of the "procedural" language of Mr. Justice Frankfurter's opinion, they held that jurisdiction cannot be found in a Section 301 suit unless the requisites of orthodox "federal question" jurisdiction under 28 U.S.C. 1331 (except the amount in controversy) exist. However desirable this reading of Section 301 may be—since it would eliminate from the scope of Section 301 virtually all suits for damages against unions—it seems inconceivable to us that either the language or the legislative history of Section 301, and particularly Section 301(a), can reasonably be argued to justify it.

B. The Petitioner's Argument

Petitioner does not offer any argument in support of the contention, implied in its question, that Section 301 does not constitute a grant of jurisdiction where no other basis for federal jurisdiction is alleged or claimed. Instead, it appears to argue, first, that there is constitutional doubt as to the validity of § 301 and, second, that, if the section is assumed to be constitutional, state law must govern as to the availability of specific performance of an agreement to arbitrate.

1. The Constitutional Issue

The constitutional issue is dealt with in the brief which counsel for respondent in this case have filed on behalf of the

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[1] The opinions of all three judges in the Fifth Circuit's decision in *Lincoln Mills* v. *Textile Workers Union*, 230 F. 2d 81, now before this Court in No. 211, are to the contrary.

petitioners in the *Lincoln Mills* case, No. 211, at pp. 48-50. We will not repeat here what we have there set forth. We should like to add, however, one additional point which may serve to dispense with the necessity of any discussion of the issue.

In *Westinghouse* the constitutional question was raised in Mr. Justice Frankfurter's opinion only because, in his view, granting the relief there sought would necessarily present that issue. Therefore, "through the orthodox process of limiting the scope of doubtful legislation" (p. 459) the statute was construed as not covering the case in question.

Here the converse is true. If this Court should conclude that the relief here sought—enforcement of the agreement to arbitrate—can be granted then no possible constitutional issue can be presented. Whether the result is reached by relying on § 301 alone, or by relying on § 301 for jurisdiction and the U. S. Arbitration Act for the remedy, the net result will be that by virtue of the impact of statutes enacted by Congress regulating interstate commerce an agreement which would not be enforceable under state law will be enforced. However this result is reached, no constitutional objection can be interposed. For the case is then clearly one arising under "the laws of the United States" regulating commerce.

The constitutional question posed by Mr. Justice Frankfurter in *Westinghouse* could only arise if the Court first decided that the question of whether the agreement to arbitrate should be enforced was to be decided by reference to state law. But if the Court should so decide, the case is ended and the constitutional question is never reached, since we concede that, under Maine law, no such remedy is here available.

2. *Whether State or Federal Law Governs*

Petitioner argues that this Court's decision in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956) requires the conclusion that state law as to the enforceability of agreements

to arbitrate must govern in this § 301 case. The *Bernhardt* case, of course, requires no such result. It holds simply that, in a suit which is heard in a Federal Court only because of diversity of citizenship, the state rule on this question so substantially affects the cause of action that under the rule of *Guaranty Trust Co.* v. *York,* 326 U.S. 99, the District Court as in substance "only another court of the State" should follow the state rule. The Court specifically held that the Arbitration Act was inapplicable because there was no evidence that the petitioner in that case "was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." 350 U.S. at 201.

Here, to the contrary, it is conceded that the National Labor Relations Act is applicable and that the controversy arose out of activity which affected commerce within the meaning of the decisions of this Court. The *Bernhardt* case, therefore, is of no assistance in determining whether state or federal law governs as to the enforceability of agreements to arbitrate.

There still remains, of course, the question of whether federal or state law is to be regarded as governing the question here presented. As we indicate in our brief in the *Lincoln Mills* case, No. 211, at pages 24-25, we do not think that the appropriate way of deciding that question is to rely on abstract analysis of whether the enforceability of arbitration provisions is to be regarded as a matter of procedure or a matter of substance; it may be either, depending upon the context. Nor do we believe that it is necessary to decide, in general terms, whether state or federal substantive law will govern in Section 301 actions.

We rest simply on a contention that Section 301 and the United States Arbitration Act, taken either together or separately, make it clear that the result here must be that in a suit brought under Section 301 an agreement to arbitrate must be enforceable, irrespective of state law. If it is neces-

sary to categorize this answer, it is possible to say, as innumerable decisions have said, that the enforceability of arbitration agreements is a procedural matter, relating to remedy rather than substance, and that in a Section 301 suit federal rather than state procedure must apply.[2] Or, it is possible to say that the question of the enforceability of an agreement to arbitrate is a substantive one and that, irrespective of the law to be applied in other respects under a Section 301 action, the nature of the objectives sought to be accomplished by Congress in enacting Section 301 are such that it must be construed as making federal substantive law, at least in this respect, applicable.

The form of the answer is immaterial. What is important is the distortion of the plain intention of Congress which would be involved in a contrary result. While much was left unsaid by Congress with respect to Section 301, (and indeed nothing was said with specific respect to the scope of the remedy granted to unions), one thing is transparently clear: Congress intended that any union which agreed that it would not strike during the term of a collective bargaining agreement should be suable in the Federal courts for damages for breach of that agreement, irrespective of state law. We would like, of course, to argue to the contrary. It would certainly be desirable for unions to be able to interpose a state rule of non-liability for such breaches where such rules exist. See *Shirley-Herman Co.* v. *International Hod Carriers,* 182 F. 2d 806, 808-809 (2d Cir., 1950). But we think that, unfortunately, such argu-

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[2] "The [New York] Arbitration Law deals merely with the remedy . . . It does not attempt . . . to modify the substantive maritime law . . ." Brandeis, J., in *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U.S. 109, 124 (1924). The question of enforceability of an agreement to arbitrate is "one of remedy only." Hughes, C. J., in *Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263, 277 (1931). "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies." Cardozo, J., in *Matter of Berkovitz* v. *Arbib & Houlberg,* 230 N.Y. 261, ——, 130 N.E. 288 (1921).

ment would be futile—the Congressional intention is too clear.

The agreement to arbitrate disputes arising during the term of an agreement is the counterpart of and consideration for the agreement not to strike. Indeed, the First Circuit has construed an agreement to arbitrate, without a specific no-strike clause, as implying an agreement not to strike. *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, 230 F. 2d 576. See also *United Construction Workers* v. *Haislip*, 223 F. 2d 872, 876 (4th Cir. 1955).

Shall a union be held liable in damages under § 301 for breach of such a clause, irrespective of state law, but be held remediless to enforce it because, under the law of a particular state, such enforcement would not be granted? Such a result seems inconceivable. If an agreement that disputes arising during the contract term shall be settled by arbitration is to be made the basis for assessing damages in a Federal court against a union which called a strike, irrespective of state law, because Congress said that such an agreement was given "statutory recognition . . . as a valid, binding and enforceable contract"[3] by Section 301 then the agreement must also be held to be valid, binding, and, we submit, "enforceable" when the employer violates it. State law must be as irrelevant for the goose as it is for the gander. And this result must be the same whether the agreement not to strike is implied, as a necessary corollary of the agreement to arbitrate, as in the *Mead* case, or expressed separately as in this case.

We do not mean to say that Congress has made it impossible for either party to contract away the remedies provided by § 301. The parties can refuse to negotiate an arbi-

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[3] S. Rep. No. 105, 80th Cong., 1st Sess., p. 17, 1 Legislative History of the Labor-Management Relations Act, 1947 (published by the National Labor Relations Board) p. 423. This collection will hereinafter be cited as "Leg. Hist. (1947)."

tration-no strike provision in the first place. And they can negotiate such a provision but provide that neither party will bring suit against the other in case of a violation. But if they do neither, Congress has provided a remedy in Section 301. That remedy is specifically made available to both parties. And in view of Congress' expressed intention to over-ride state law when an employer sues, a similar intention must be inferred with respect to suits by unions.

II—WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 GRANTED TO THE DISTRICT COURTS OF THE UNITED STATES EQUITABLE JURISDICTION TO COMPEL SPECIFIC PERFORMANCE OF ARBITRATION CLAUSES IN A COLLECTIVE BARGAINING AGREEMENT.

A. The Question

There are two questions here: (1) whether Section 301 is to be read only as authorizing suits for damages or, on the other hand, as including authority to grant equitable relief where appropriate; (2) whether, assuming that a district court can give equitable relief of some kinds in a Section 301 suit, it is authorized by Section 301 to grant the particular relief of specific performance of an arbitration covenant.

Petitioner in this case, in its brief at pp. 11-16, appears to argue exclusively the first point, viz., the availability of equitable relief of any kind. Petitioner in the *General Electric case,* No. 276, also urges that there are indications that no equitable relief of any kind was meant to be available in a § 301 action. It says, however, that the Court need not decide that question since it is clear that Congress meant to exclude from the scope of § 301 the specific kind of equitable relief here requested—enforcement of an agreement to arbitrate. (Brief for Petitioners in No. 276, pp. 41-48.) We will deal with each of these contentions below.

B. The Argument of Petitioner in This Case—the Claimed Unavailability of Any Equitable Relief

The petitioner in this case, and the petitioner in No. 276, cite several instances in the Congressional debate in which Section 301 was referred to as providing for suits for damages. From this they argue that despite the unrestricted language of Section 301 it should be read as encompassing not simply "suits" but only "suits for damages."

Petitioners in both cases are too modest. They have not argued the full conclusion to which their citation of authority necessarily leads. That conclusion is very simple: Section 301 was not meant to authorize any suits by unions at all. Most of the shorthand expressions upon which the petitioners rely say, in substance, that under Section 301 unions could be sued for damages. Not one refers specifically to a suit by a union or discusses the relief which could be granted in such a suit. It follows therefore, that, on a parity of reasoning with that used by petitioners, the words in Section 301 which say that all "suits for violation of contracts between an employer and a labor organization" may be brought in a federal district court should be ignored and jurisdiction limited only to those cases in which an employer is the plaintiff.

The short answer to arguments based upon this kind of "legislative history," of course, is that none of these statements was formulated as a careful definition of the scope of Section 301. They were shorthand references in which the principal expected application of the proposed section was being used in place of a full description. Even in the few instances where the word "damages" was used without specific limitation to suits against unions, still the intention, plain from the context, was to refer to damages for breach of collective agreements by unions.

This was quite natural. As we point out in our brief in the *Lincoln Mills* case, No. 211, at pp. 43-45, Congress gave and intended to give a remedy to both unions and employers

but the entire Congressional discussion was focused on the cases in which unions would be sued because they violated no-strike clauses in their agreements. And it is true that in such suits only damages could usually be recovered, not because of any limitation in Section 301, but because in most cases, although not necessarily in all, the Norris-LaGuardia Act would prevent an employer from obtaining an injunction.

Naturally, therefore, § 301 was referred to in the discussion as providing for suits for damages, and usually as providing for suits for damages against unions. But no Congressman or Senator said, and no report, either in the House or the Senate said, that unions could *not* sue under § 301 or that, if they sued, they could *not* get equitable relief where appropriate. The legislative history is devoid of a single piece of evidence specifically showing an intention to exclude equitable relief. Indeed, if we have recourse to the actual history of the legislation, rather than the quotation of statements, the contrary plainly appears.

In the House bill what is now Section 301 was Section 302 and what is now Section 301(a) was Section 302(a). But Section 302 of the House bill carried a sub-section which did not appear in the Senate bill or in the bill finally passed. This was Section 302(e). It provided that in actions brought under Section 302(a) the Norris-LaGuardia Act should not be applicable![4] Clearly, then, the House thought that Section 302(a) encompassed equitable relief. Otherwise, the provision with respect to Norris-La Guardia made no sense.

The Senate bill, as stated, did not contain the House provision making the Norris-LaGuardia Act inapplicable. And, in conference, the Senate's views prevailed; the House provision was deleted. But surely this sequence cannot be read as providing a basis for arguing that no jurisdiction to

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[4] H.R. 3020, 80th Cong., 1st Sess., as passed House; 1 Leg. Hist. (1947) p. 222.

grant equitable relief was being granted. To the contrary, the only permissible inference is that the bill which finally passed permitted equitable relief except in the cases where it would be barred by Norris-LaGuardia.

This has been the unanimous opinion of every Court of Appeals which has passed upon the question. Concededly some have held that specific performance of an agreement to arbitrate cannot be obtained under Section 301 if the law of the applicable state would not grant such relief, but neither the First,[5] the Third,[6] the Fifth,[7] the Sixth,[8] nor the Seventh[9] Circuits have expressed any doubt in holding, or assuming, that equitable relief would be available in a Section 301 suit in appropriate cases.

C. The Argument of Petitioner in the *General Electric* Case —the Claimed Intention of Congress Not to Permit Enforcement of Arbitration in Collective Agreements

In *General Electric* v. *Local 205*, No. 276, the petitioner argues that it is unnecessary to decide whether Section 301 authorizes equitable relief in general because, as petitioner puts it: "Congress specifically considered and decided against providing for the enforcement of arbitration agreements."[10] Indeed, petitioner there says, Congress "fully aware of the problems of arbitration in the labor field deliberately stopped short of providing enforcement through judicial or other process."[11]

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[5] *Local 205* v. *General Electric Co.*, 233 F. 2d 85 (1956), No. 276 this Term.

[6] *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (1956).

[7] *Textile Workers* v. *Lincoln Mills of Alabama*, 230 F. 2d 81 (1956), No. 211 this Term.

[8] *Milk & Ice Cream Drivers* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (1953).

[9] *United Steelworkers of America* v. *Galland-Henning Mfg. Co.*, 39 LRRM 2384 (7th Cir., Fed. 4, 1957).

[10] Brief for Petitioner in No. 276, p. 45.

[11] *Id.* at p. 48.

If these statements are correct, this branch of the case is over. If there is any evidence that Congress considered the common law rule of non-enforceability of arbitration agreements, regarded it as applicable to collective agreements, and consciously limited the provisions of Section 301 so as not to change that rule, then the statute should obviously be construed in the light of that intention.

The plain fact is that these statements are not correct. There is not one single suggestion in the legislative history of Section 301 that Congress adverted at all to the common law rule against the enforceability of arbitration agreements. Nor is there even a hint that Congress thought that this rule was applicable to grievance arbitration under collective agreements or would be relevant in a Section 301 suit. Consequently, there is simply no evidence that Congress considered that agreements to arbitrate grievances would not be enforceable in a § 301 suit.

What, then, is the basis for the argument of petitioner in No. 276? Disregarding for the moment the use of materials dealing with other subjects (for which see, below, pp.——), the argument comes down to this. The original Senate bill not only contained § 301 but also contained in Sections 8(a)(6) and 8(b)(5) provisions making it an unfair labor practice to violate the terms of a collective agreement or an agreement to submit a labor dispute to arbitration.[12] If these provisions had been enacted, obviously something like a decree for specific performance of an agreement to arbitrate grievances could have eventuated. This is so because the National Labor Relations Board always proceeds by way of a cease and desist order which can be enforced in a Court of Appeals, not by way of a remedy in damages. But these provisions were deleted in conference. Therefore, it is concluded, Congress decided

[12] H.R. 3020 as passed by the Senate; 1 Leg. Hist. (1947) 239, 241-242. The House bill would have had the same effect by virtue of its definition of the duty to bargain collectively in Section 2(11)(A); 1 Leg. Hist. (1947) 163.

that agreements to arbitrate grievances should not be specifically enforceable under § 301.

This argument assumes, first, that Congress was aware that specific performance would not be available in a § 301 suit and, second, that the reason the unfair labor practice provisions were dropped was to retain that result. Neither assumption is correct. Indeed, the report of the Senate Committee makes it quite clear that the unfair labor practice provisions were inserted simply to provide another forum, in addition to that being provided by § 301, to deal with the same subject. As the report says:

> "While Title III of the Committee bill treats this subject by giving both parties rights to sue in the United States District Court, the committee believes that such action should also be available before an administrative body." [13]

The minority objected to providing this choice of forums. As they put it:

> ". . . sections 8(a)(6) and 8(b)(5) together with section 301 would give rise to a conflict of jurisdiction between the National Labor Relations Board and the United States district courts. This latter section permits suits in the United States district courts for violations of collective bargaining agreements. Parties to such agreements thus have the choice of bringing their action before the Board or the United States district courts. Obviously, the necessity for uniform decisions in such matters and the avoidance of conflicting decisional rules by judicial bodies make this legislative scheme wholly undesirable." [14]

The views of the minority were not persuasive in the

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[13] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 20-21; 1 Leg. Hist. (1947) pp. 426-427.

[14] *Id.*, Pt. 2 (Minority Views) p. 13; 1 Leg. Hist. (1947) 475.

Senate. But similar fears were again expressed by the House conferees when the bill went to conference. As Senator Taft explained:

> "The House conferees objected to this provision on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board, rather than by the courts." [15]

Therefore, he said, the Senate conferees agreed to its deletion. Section 301, however, was retained. "If both provisions had remained, there would have been a probable conflict of remedies and decisions."[16]

The House Conference Report expressed substantially the same thought in explaining the deletion of the Senate's unfair labor practice provision:

> "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." [17]

It is simply not possible to read this history as constituting either Congressional recognition that grievance arbitration could not be compelled in a § 301 suit or a Congressional decision that it should not be so compelled. To the contrary, if anything can be gleaned from these materials it is that Congress was not aware of any significant difference in the scope of the remedies which would be available under § 301 and the proposed Sections 8(a)(6) and 8(b)(5) and

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[15] 93 Cong. Rec. 6443; 2 Leg. Hist. (1947) 1539. This same analysis is cited by petitioner in No. 276 as "93 Cong. Rec. 6600." The difference in pagination probably results from the use by petitioner of the compilation published by the NLRB which reproduced the pages of the daily Congressional Record before revision and re-pagination.

[16] *Ibid.*

[17] House Conf. Rept. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 42; 1 Leg. Hist. (1947) 546.

it has made. And, at least to a degree, the Federal courts will not be faced with the burden of deciding "a potential flood of grievances based upon an employer's failure to comply with the terms of a collective agreement relating to compensation [which are] peculiar in the individual benefit which is their subject matter . . ." 348 U.S. at 460 (Frankfurter, J.).

VI—WHETHER AN ORDER OF A DISTRICT COURT UNDER § 4 OF THE ARBITRATION ACT, DIRECTING THE PARTIES TO PERFORM AN AGREEMENT TO ARBITRATE, IS A "FINAL" DECISION FROM WHICH AN APPEAL MAY BE TAKEN UNDER 28 U.S.C. 1291.

This question must be decided here only if the Court should hold, in agreement with the First Circuit, that the agreement to arbitrate grievances is not enforceable by virtue of Section 301 standing alone, but is only enforceable because the remedies provided for in the Arbitration Act can be applied in a Section 301 suit. If the Court should rule, as we urge, that the agreement to arbitrate here is enforceable as an essential part of the no strike-arbitration provision which Congress meant to be enforceable in the Federal courts, this issue disappears. For, in that event, it is clear that arbitration is not simply a step in the ultimate judicial enforcement of a claim but is the full and final relief requested by the plaintiff. No question could possibly be raised that an order which gives the plaintiff all of the relief he asks in his complaint is not a final order within the meaning of 28 U.S.C. § 1291. And, in any case, the order to arbitrate, being an injunctive order is clearly appealable even if interlocutory under the provisions of 28 U.S.C. § 1292(1).

If, on the other hand, this Court should treat grievance arbitration in the same manner as commercial arbitration is treated under the Arbitration Act, then there seems to be a serious question as to the appealability of a District Court

order directing that arbitration proceed. The Second Circuit has held that an order directing arbitration under Section 4 of the Arbitration Act is not appealable. This was clearly held in re *Pahlberg Petition,* 131 F. 2d 968 (1942), as well as in *Stathatos* v. *Arnold Bernstein SS Corp.,* 202 F. 2d 525 (1953). The earlier decision of the Second Circuit in *Krauss Bros. Lumber Co.* v. *Bossert,* 62 F. 2d 1004 (1933) is apparently regarded by the Second Circuit as no longer good law, since it was decided before this Court's decisions in the *Enolow* case[32] and the *Shanferoke Coal* case.[33] Indeed, this Court in *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 456, affirmed a decision of the Ninth Circuit which it accepted for review on the claim of conflict with the Second Circuit's decision in the *Krauss Bros.* case.

There can be no question that under the rule of *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, an order staying a proceeding pending arbitration is not appealable except in the case in which the proceeding being stayed is a proceeding at law. In the latter case, the stay order is regarded as the equivalent of an independent injunction by a court of equity against the pending proceedings at law and is therefore appealable as an interlocutory injunction. If the original cause of action is equitable in nature, the stay pending arbitration is regarded merely as a step in the litigation of the original cause of action.

The basis for the Second Circuit's most recent position seems to be that the same rule should be applied in any case in which arbitration is directed, whether or not the first step is the filing of a suit, which is stayed pending arbitration, or is a petition to compel arbitration. See *Stathatos* v. *Arnold Bernstein SS Corp.,* 202 F. 2d 525, at 527. ("There seems to be no grounds for distinctions here based

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[32] *Enolow* v. *New York Life Insurance Co.,* 293 U.S. 379.

[33] *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U.S. 449.

upon the procedural mechanics which lead to the orders.")

We express no opinion on this subject as it applies to commercial arbitration. As we indicated to the Court in our Memorandum on Certiorari the issue was raised *sua sponte* by the Court of Appeals.

We do believe, however, that the issue serves to emphasize our view that grievance arbitration is so different from commercial arbitration that the common law rule against enforceability is simply inapplicable to it. It is simply not sensible to regard the order directing arbitration here as simply a procedural order adopted in the action in place of a trial at common law. The arbitration here sought was not agreed upon as a method of avoiding litigation or simplifying the trial of issues which might arise during the course of the agreement. It was adopted as a substitute for the only other method which a union can reserve in order to protect the contract which it has negotiated—the right to strike. The agreement should be enforced as such and without reference to doctrines evolved to deal with an entirely different kind of an agreement. If it is so enforced, we concede the order granting enforcement is applicable.

CONCLUSION

For the reasons above set forth it is respectfully submitted that the decision below should be affirmed.

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